TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 36.

GEORGE F. UNDERHILL, PLAINTIFF IN ERROR,

vs.

JOSE MANUEL HERNANDEZ.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED MARCH 2, 1895.
CERTIORARI AND RETURN FILED MARCH 27, 1895.

(15,810.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 238

GEORGE F. UNDERHILL, PLAINTIFF IN ERROR,

vs.

JOSE MANUEL HERNANDEZ.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS. WASHINGTON, D. C., JANUARY 19, 1897.

a United States Circuit Court of Appeals for the Second Circuit.

GEORGE F. UNDERHILL, Plaintiff in Error,
vs.
JOSE MANUEL HERNANDEZ, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the eastern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Oct. 5, 1894. John A. Shields, clerk.

1 Circuit Court of the United States, Eastern District of New York.

GEORGE F. UNDERHILL
vs.
JOSE MANUEL HERNANDEZ. } Rule.

This cause having originally been commenced in the supreme court of the State of New York, for the county of Kings, and the same having been removed thence into this court on the application of the above-named defendant, and the said defendant having this day duly filed and entered in this court a certified copy of the record in the said supreme court, it is now, on motion of Coudert Brothers, attorneys for the said defendant,

Ordered, that this action do proceed in this court in the same manner as if it had been brought therein by original process, and that the supreme court of the State of New York proceed no further therein, and that the appearance of said defendant by Coudert Brothers, his attorneys, be and the same hereby is noted.

Dated, Brooklyn, December 28, 1893.

2 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant. } Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated November 2, 1893.

LOGAN, CLARK & DEMOND,
Plaintiff's Attorneys.

Office and P. O. address, No. 58 William street, New York city.

3 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant.

The plaintiff, for his cause of action against the defendant, alleges as follows:

I. That on the 13th day of August, 1892, at the city of Bolivar, in the Republic of Venezuela, South America, the defendant falsely, maliciously, without right or color of right, and wholly without reasonable cause or any provocation whatsoever, imprisoned the plaintiff in a certain house, namely, in the house which the plaintiff had theretofore occupied; and kept him so imprisoned up to October 18, 1892.

II. That frequently during said time the plaintiff demanded of the defendant that he, the plaintiff, be allowed to leave the city of Bolivar, but that the defendant refused.

III. That during said time the defendant also assaulted and beat the plaintiff by putting armed persons around the said house, by placing cannon around it, by depriving the plaintiff of wood and food and other necessaries of life, and by various other actions and words threatened the life and bodily security of the plaintiff.

IV. That, in consequence of such false imprisonment and assaults and threats, the plaintiff was prevented from attending to his necessary affairs and business during that time, and was made
4 sick; and that during said time for about three weeks he lay seriously ill, part of the time in imminent danger of dying therefrom.

V. That the plaintiff has been damaged thereby in the sum of twenty-five thousand dollars ($25,000), reckoning solely the injuries to his person, and exclusive of the loss of property which the plaintiff was compelled to surrender under duress.

Wherefore the plaintiff demands judgment for twenty-five thousand dollars ($25,000), with costs of this action.

LOGAN, CLARK & DEMOND,
Plaintiff's Attorneys, 58 William St., New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

George F. Underhill, being duly sworn, says that he is the plaintiff herein, and that he has read the foregoing complaint; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. GEORGE F. UNDERHILL.

Sworn to before me this 25th day of November, 1893.

M. E. HARBY,
Commissioner of Deeds, New York County.

(Endorsed:) Supreme court, Kings county. George F. Underhill against Jose Manuel Hernandez. Complaint. Logan, Clark & Demond, att'ys for plaintiff, 58 William street, New York.

5 STATE OF NEW YORK, } ss.:
County of Kings, }

I, John Cottier, clerk of the county of Kings, and clerk of the supreme court of the State of New York, in and for said county [L. s.] (said court being a court of record), do hereby certify, that I have compared the annexed with the original summons and complaint, filed in my office December 21, 1893, and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and court this 22d day of December, 1893.

JOHN COTTIER, *Clerk.*

6 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff, } Notice of Appearance.
against
JOSE MANUEL HERNANDEZ, Defendant. }

SIRS: Please take notice, that the defendant appears in this action, and that we have been retained as attorneys for him therein, and demand that a copy of the complaint, and all papers in this action, be served on us at our office, numbers 68 and 70 William street, New York city.

N. Y., Nov. 22d, 1893.

Yours, &c., COUDERT BROTHERS,
Attorneys for Defendant.

Office No. and Post-office address, 68 and 70 William St., New York city, New York.

To Logan, Clark & Demond, plaintiff's attorneys, 58 William St., New York city.

(Endorsed:) Supreme court, Kings county. George F. Underhill ag'st Jose Manuel Hernandez. Notice of appearance of defendant. Coudert Brothers, attorneys for defendant. Due and timely service of a notice of which the within is a copy, admitted this 22d day of Nov., 1893. Plaintiff's attorney.

7 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff, } Order to Arrest and Hold to Bail.
against
JOSE MANUEL HERNANDEZ, Defendant. }

To the sheriff of any county of the State of New York:

It having been made to appear to me by the affidavit of George F. Underhill and Jennie L. Underhill, that a sufficient cause of action exists against the defendant, Jose Manuel Hernandez, and that the case is one of those mentioned in article 1st, chapter 7, title 1, of the New York Code of Civil Procedure, and that the ground of arrest

is the nature of the action, being for false imprisonment, assault and battery and other personal injuries.

You are required forthwith to arrest Jose Manuel Hernandez, the defendant in this action, if he is found within your county, and to hold him to bail in the sum of ten thousand dollars and to return this order, with your proceedings thereunder, as prescribed by law.

Dated Brooklyn, November 2d, 1893.

EDGAR M. CULLEN, *J. S. C.*

LOGAN, CLARK & DEMOND,
Plaintiff's Attorney-, 58 William St., N. Y. City.

8 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant.

CITY AND COUNTY OF NEW YORK, *ss.:*

George F. Underhill, being duly sworn, says that he is the plaintiff herein. That he is a citizen of the United States of America, and resides at 260 Forty-fifth street in the city of Brooklyn, State of New York.

That the defendant is not a citizen of the United States and is not a resident of the State of New York, or of the United States of America, but is a citizen of the Republic of Venezuela, and is now temporarily in the city of New York, intending, as deponent is informed and believes, to depart for Venezuela within a day or two.

That in the month of August, 1892, and for several years prior thereto, the plaintiff resided with his family at Ciudad Bolivar, in the Republic of Venezuela, South America; that he, the plaintiff, was engaged in business there, namely, in the management of the water works which supplied water to that city; that such business was entirely his own; that deponent had built it up entirely by his own efforts, and erected the plant and furnished the money therefor; that this had been a very large undertaking and had taken him several years to accomplish and had cost at least $75,000 United States money; that it was a successful business, was yielding a net income of over $4,500 a year, and was worth at least $50,000, United States money.

9 That during a few months prior to the month of August, 1892, the defendant had organized a revolutionary band of followers without any authority of any kind whatsoever, from the government, and was in open revolt and in armed conflict with all the constituted authorities of the city, the State or the Republic.

That on the 9th day of August, 1892, the defendant, with his band of followers, succeeded in defeating that portion of the government troops which were stationed near Ciudad Bolivar and which were under the command of General Santos Carrera; and on the 13th of August, 1892, the defendant with his followers entered Ciudad Bolivar and took possession of the city and assumed com-

mand and all governmental authority therein, arbitrarily, and without any right or color of right whatsoever from any constituted authority of the city, State or Republic.

That deponent was then in Ciudad Bolivar, living in his own house with his wife and servants. That on or about the said 13th day of August the defendant maliciously and without any provocation whatsoever, confined deponent in his said house, setting armed guards around it and subjecting deponent to all sorts of indignities and threats of violence.

That the defendant kept deponent so imprisoned in his house from the said 13th day of August, 1892, to about the 1st day of October, 1892, and did not allow him to go outside of his house, except on one occasion during the month of August, when he ordered the plaintiff to go to the steamer Socorro, which was then lying in the river, in order to make an examination of the same with regard to repairing it, and that on such occasion he was escorted to the said steamer and back by armed guards; and except on one other occasion, when he was also attended by an armed guard.

That during said period deponent frequently demanded of the defendant permission to leave the city and the country of Venezuela, but that the defendant refused to allow him to go out; that such demands were made to the defendant personally by friends of deponent, by one named Manuel Grillet, a native of that city and a gentleman of the highest standing there, by Mr. Harold Jennings, an English subject who was in the employ of deponent at that time, and by deponent's wife, Jennie L. Underhill, and by others.

On one occasion, namely about the 14th day of September, 1892, deponent himself, at the risk of his life, went personally to the defendant and demanded permission to leave the city and the Republic and was refused, just as all the other demands of his friends had been refused.

That during said imprisonment threats against his life were frequently made, and, as deponent firmly believes, with the knowledge and connivance of the defendant; that the supplies of wood and other necessary things for the household were cut off; and that, during nearly all of said time, cannon were placed in front of the house, pointing towards the house.

That in consequence of said imprisonment, assault and deponent's anxiety about himself and his wife, deponent was taken sick and lay seriously ill in said house for about three weeks, and that during a portion of such time his life was seriously in danger.

That the defendant, through certain agents coming from the defendant, personally, as they declared to deponent, demanded of deponent that he sell to the defendant his aforesaid business, with all the plant and property connected therewith, and threatened if deponent should not consent to sell the same deponent would be indefinitely imprisoned; and moreover, that he should be imprisoned in the jail. That the price offered by the defendant for the said property and business was at first eight thousand pesos; that afterwards they offered 6,500 pesos, a sum equal to about $5,000 in

money of the United States; that finally, under said duress, deponent was compelled to sign papers transferring the said business and property to one B. Tomassi & Co., for the sum of 6,500 pesos; and that upon the completion of such transfer the defendant liberated the deponent from his imprisonment and allowed him to leave Ciudad Bolivar.

That in consequence of the foregoing facts deponent has
11 lost his entire fortune, all that he had having been invested in the said business and water works; that he was obliged, in order to save his life, to leave that country, and thus sever permanently all his prior business connections and opportunities.

That deponent places his damages at the hands of the defendant, on account of the foregoing facts, at $75,000; being $50,000 for the loss of his business and property and $25,000 for the personal injuries and indignities to which he was subjected.

That he has commenced suit against the defendant for the said damages, upon the said cause of action, and that the summons annexed hereto is a copy of the summons in such action.

GEORGE F. UNDERHILL.

Sworn to before me this 2nd day of November, 1893.

F. H. KNIGHT,
Notary Public, N. Y. Co.

12 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant.

CITY AND COUNTY OF NEW YORK, *ss*:

Jennie L. Underhill, being duly sworn, states that she is the wife of the plaintiff herein. That she has read the affidavit of the plaintiff, George F. Underhill, herein, verified the same day as this, and knows the contents thereof.

That she was personally present with her husband during all the time of his imprisonment, and in the same house with him, up to the second day of October, 1892, when she left Bolivar, and that she has personal knowledge of the facts relating to the said imprisonment and the indignities and threats heaped upon him, and the sickness of her husband in consequence thereof; and that all the facts relating thereto stated in the said affidavit are true.

That on one occasion, namely on the 27th day of September, 1892, deponent had a personal interview with the defendant, and demanded on behalf of her said husband that he be allowed to leave the country, but that the defendant refused.

JENNIE L. UNDERHILL.

Sworn to before me this 2nd day of November, 1893.

F. H. KNIGHT,
Notary Public, N. Y. Co.

13 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Salter S. Clark, being duly sworn, says that he is one of the attorneys for the plaintiff in this action. That no previous application has been made for an order of arrest herein.

SALTER S. CLARK.

Sworn to before me this 2d day of November, 1893.

F. H. KNIGHT,
Notary Public, N. Y. City.

14 Supreme Court, Kings County.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant.

Undertaking on Order to Arrest.

Whereas, the plaintiff above named, has made application to one of the justices of the above-named court to arrest the above-named defendant, in an action for false imprisonment and other personal injuries:

Now, therefore, we, George F. Underhill, the plaintiff, of No. 260 Forty-fifth street, in the city of Brooklyn, and Clarence Kenyon, of No. 170 St. Marks avenue, in said city of Brooklyn, and Charles E. Phelps, of Bay Shore, Long island, State of New York, do hereby, pursuant to the statute in such case made and provided, jointly and severally undertake, that if the defendant in the action do recover judgment therein, or, if it is finally decided that the plaintiff is not entitled to an order of arrest, the plaintiff in said action will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the arrest in said action, and not exceeding the sum of two thousand dollars.

Dated New York, November 2d, 1893.

GEORGE F. UNDERHILL.
CHARLES E. PHELPS.
CLARENCE KENYON.

CITY AND COUNTY OF NEW YORK, *ss:*

Clarence Kenyon, being duly sworn, says that he is a resident and householder within the State of New York, and worth
15 double the sum specified in the above undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

CLARENCE KENYON.

Sworn to before me this 2d day of November, 1893.

F. H. KNIGHT,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles E. Phelps, being duly sworn, says that he is a resident and a freeholder within the State of New York, and worth double the amount specified in the above undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

CHAS. E. PHELPS.

Sworn to before me this 2d day of November, 1893.

F. H. KNIGHT,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

I certify that on this 2d day of November, 1893, before me personally appeared the above-named George F. Underhill, Clarence Kenyon and Charles E. Phelps, known to me, and to me known to be the individuals described in, and who executed the above undertaking, and severally acknowledged that they executed the same.

F. H. KNIGHT,
Notary Public, N. Y. Co.

(Endorsed:) Order to arrest, &c., affidavit and undertaking on order to arrest.

16 Know all men by these presents, that Jose Manuel Hernandez, as principal, and Elizabeth Cadenas, as surety, are holden and stand firmly bound unto George F. Underhill in the penal sum of one thousand dollars, for the payment whereof well and truly to be made unto the said George F. Underhill, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Upon condition nevertheless that whereas, one Jose Manuel Hernandez has petitioned the supreme court of the State of New York, in and for the county of Kings, for the removal of a certain cause therein pending, wherein the said George F. Underhill is plaintiff, and the said Jose Manuel Hernandez is defendant, to the circuit court *court* of the United States in and for the eastern district of New York.

Now, if the said Jose Manuel Hernandez shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall duly enter such special bail therein as may have been originally requisite herein, then this obli-

gation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, the said Jose Manuel Hernandez and Elizabeth Cadenas have hereunto set their hands and seals this 14th day of December, A. D. 1893.

JOSE MANUEL HERNANDEZ, [SEAL.]
By COUDERT BROTHERS, *His Att'ys.*
ELIZABETH CADENAS. [SEAL.]

17 STATE OF NEW YORK, }
City and County of New York, } ss.:

Elizabeth Cadenas, being duly sworn, deposes and says: I reside in the city of Brooklyn, county of Kings, and State of New York, and am a freeholder therein; and am worth the sum of two thousand dollars over and above all property exempt from execution.

ELIZABETH CADENAS.

Sworn to before me this 14th day of December, 1893.

RICHARD TONE PETTIT,
[L. S.] *Notary Public, No. 13, City, County, and State of New York.*

STATE OF NEW YORK, }
City and County of New York, } ss.:

On this 14th day of December, 1893, before me personally came Paul Fuller, to me known and known to me to be a member of the firm of Coudert Brothers and the same individual who executed the foregoing instrument in the name of Jose Manuel Hernandez, therein described as principal, by Coudert Brothers, his attorneys, and acknowledged to me that he executed the same as the act and deed of his said firm of Coudert Brothers, attorneys, for Jose Manuel Hernandez for the purposes therein set forth.

And on the same day also appeared before me Elizabeth Cadenas, to me known to be the other individual described in and who executed the foregoing instrument and acknowledged to me that she executed the foregoing instrument and acknowledged to me that she executed the same for the purposes therein set forth.

RICHARD TONE PETTIT,
Notary Public, No. 13, City, County, and State of New York.

(Endorsed:) Undertaking on removal to circuit court. Accepted and approved Dec. 15, 1893. Edgar M. Cullen, J.

18 At a special term of the supreme court held in and for the county of Kings, at the county court-house in the city of Brooklyn, on this 15th day of December, 1893.

Present: Hon. Edgar M. Cullen, justice.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant.

On reading and filing the petition of Jose Manuel Hernandez, verified the 14th day of December, 1893, and the complaint herein, by which it appears that the controversy herein is between a citizen of this State and a citizen of a foreign nation, and that matter and amount in dispute exceeds exclusively of costs and interest the sum or value of two thousand dollars, and the defendant having filed the good and sufficient bond required by law for his entering in the circuit court of the United States for the eastern district of New York on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if the said court shall hold that this suit was wrongfully or improperly removed thereto, and also for his appearing and entering such special bail therein as was originally requisite therein; and on motion of Coudert Brothers, attorneys for defendants, it is

Ordered, that this cause be and the same hereby is removed from this court to the circuit court of the United States for the eastern district of New York, and that this court proceed no further therein.

Granted December 15, 1893.

EDGAR M. CULLEN, *J. S. C.*

JOHN COTTIER, *Clerk.*

19 Supreme Court of New York, Kings County.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant.
Petition for Removal to U. S. Circuit Court.

To the honorable the supreme court of the State of New York, held in and for the county of Kings:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs and interest, the sum or value of two thousand dollars, that is to say, the plaintiff's demand against this defendant is for $75,000 (seventy-five thousand dollars), as the alleged damages which the plaintiff seeks to recover for alleged damages by him suffered in person and property through the alleged fault of the defendant.

That the controversy in said suit is between a citizen of this State and a citizen of a foreign nation; the plaintiff having been at the time of the commencement of this suit as he still is, a citizen of the United States residing in the city of Brooklyn, in the State of New York, and this defendant having been at the time of the commencement of this suit, as he still is, a citizen and resident of the Republic of Venezuela.

And your petitioner offers herewith a good and sufficient surety

for his entering in the circuit court of the United States for the eastern district of New York, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed therefrom, and also
20 for his appearing and entering such special bail therein as was originally requisite therein.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the eastern district of New York; and he will ever pray.

JOSE MANUEL HERNANDEZ,
By COUDERT BROTHERS,
His Attorneys.

STATE OF NEW YORK, }
City and County of New York, } ss.:

Paul Fuller, being duly sworn, deposes and says: I am a member of the firm of Coudert Brothers, attorneys for the defendant and petitioner herein, by whom the foregoing petition is signed in the name and on behalf of the said petitioner, the latter being absent from this State and the United States at the date hereof. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

PAUL FULLER.

Sworn to before me this 14th day of December, 1893.

RICHARD TONE PETTIT,
Notary Public, No. 13, *City, County, and State of New York.*

21 STATE OF NEW YORK, }
City and County of New York, } ss.:

On this 14th day of December, 1893, in the city and county of New York, before me, a notary public in and for said county, personally appeared Paul Fuller, to me personally known and known to me to be the same person who executed the foregoing petition, and then and there acknowledged to me that he had executed the same in the name and on behalf of the petitioner therein named.

RICHARD TONE PETTIT,
Notary Public, No. 13, *City, County, and State of New York.*

STATE OF NEW YORK, }
County of Kings, } ss.:

I, John Cottier, clerk of the county of Kings, and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the annexed with the original notice of appearance, order

of arrest, affidavits of George F. Underhill and Jennie L. Underhill, Salter S. Clark, undertaking on arrest, petition, bond, and order removing case to U. S. circuit court, filed in my office on November 14th and December 15th, 1893, respectively, and that the same are true transcripts thereof, and of the whole of such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and court, this 22d day of December, 1893.

JOHN COTTIER, *Clerk.*

22 United States Circuit Court, Eastern District of New York.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant. } Answer.

Jose Manuel Hernandez, the defendant in the above-entitled action, by Coudert Brothers, his attorneys, answers the complaint herein as follows:

I. He denies each and every allegation in the said complaint contained.

II. For a further and separate defense, the defendant says that whatever was in fact done or authorized by him in or about the matters or events to which, as he is informed and believes, the allegations of the complaint refer, was so done or authorized by him in his official capacity as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar, in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise.

Wherefore, the defendant demands judgment dismissing the complaint with costs.

COUDERT BROTHERS,
Defendant's Attorneys.

23 CITY AND COUNTY OF NEW YORK, *ss:*

Jose Manuel Hernandez, being duly sworn, says *the* he is the defendant in the foregoing answer named; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, as to which matters he believes it to be true.

JOSE MANUEL HERNANDEZ.

Sworn to before me January 2, 1894.

RICHARD TONE PETTIT,
[SEAL.] *Notary Public, No. 13, City, County, and State of New York.*

(Endorsed:) United States circuit court, eastern district of New York. George F. Underhill, plaintiff, against Jose Manuel Hernandez, defendant. Answer. Coudert Brothers, defendant's attorneys, 68 and 70 William street, New York. Filed January 4, 1894.

24 At a stated term of the circuit court of the United States of America, for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 27th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Hon. Hoyt H. Wheeler, district judge holding the court.

GEORGE F. UNDERHILL
vs.
JOSE MANUEL HERNANDEZ.

Cause called. Trial ordered.

Appearances: Messrs. Logan, Clark & Demond, for plaintiff; Messrs. Coudert Brothers, for defendant.

Jury ordered and drawn, as follows:

Robert T. Mills,	John B. McDonald,
James W. Carmichael,	James M. Baker,
Silas W. Driggs,	George G. Leighton,
McCombs Green,	John H. Curtiss,
Richard U. Lee,	John W. Cummings,
William T. Lees,	August Deiter,
George G. Leighton,	George H. Heinbockel,
excused.	drawn.

Jury sworn.

Mr. Clarke addresses the jury for plaintiff.

Mr. Coudert moves to direct verdict for the defendant on the opening of counsel for plaintiff. Motion denied.

25 EMMETT R. OLCOTT, called as a witness for plaintiff, sworn:

Examined by Mr. CLARKE:

No cross-examination.
Copy of Code of Venezuela offered in evidence.
Copy of constitution of Venezuela offered in evidence.
Letter from Department of State offered in evidence.
Contract for water works marked for identification.

GEORGE F. UNDERHILL, called as a witness for plaintiff and sworn:

Examined by Mr. CLARKE:

Spanish letter and translation offered in evidence.
Photos offered in evidence. Plan offered in evidence.

Cross-examined by Mr. COUDERT:

Hearing suspended to March 24, 1894.

MARCH 28, 1894.

Stated Term.

Hearing resumed. Same appearances.

GEORGE F. UNDERHILL, recalled as a witness:

Cross-examined by Mr. COUDERT:

JENNIE L. UNDERHILL, called as a witness for plaintiff and sworn:

Examined by Mr. CLARKE:

Mr. Clarke reads the deposition of James Rowe.

26 Cross-examined by Mr. COUDERT:

JAMES WETHERELL, called as a witness for plaintiff and sworn:

Examined by Mr. CLARK:

Cross-examined by Mr. COUDERT:

Plaintiff rests.

Motion to direct verdict for defendant by Mr. Coudert. Mr. Clark opposed. Motion argued and submitted.

Plaintiff's counsel requests the court for leave to go to the jury upon questions submitted to the number of eleven.

Request denied. Exception taken by plaintiff's counsel.

Hearing suspended to March 29, 1894, at 10.30 a. m.

MARCH 29, 1894.

Stated Term.

Hearing resumed. Same appearances.

Motion to direct verdict for defendant granted.

Exception taken.

Verdict taken for defendant by direction of court. Stay of judgment, and 60 days to make a case or bill of exceptions granted.

27 United States Circuit Court for the Eastern District of New York.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant. } Judgment. June 1, 1894.

The issues in this action having been brought on for trial before Hon. Hoyt H. Wheeler, district judge, and a jury, at a term of this court, held at the post-office building, in the city of Brooklyn, on the 27th and 28th days of March, 1894, and the plaintiff having appeared herein by Messrs. Logan, Clark & Demond, and the defendant having appeared herein by Messrs. Coudert Brothers, and the defendant herein having moved, on the close of the plaintiff's case, for a direction by the court of a verdict in defendant's favor, and the court having granted said motion, with a stay of sixty days

from said 28th day of March, 1894, of all proceedings in this action, and the jury having thereupon rendered a verdict in favor of the defendant, and the defendant's costs and disbursements having been taxed at the sum of fifty-nine $\frac{25}{100}$ dollars ($59.25);

Now, on motion of Coudert Brothers, attorneys for the above-named defendant, it is

Ordered, adjudged, and decreed that Jose Manuel Hernandez, the defendant herein, recover of George F. Underhill, the plaintiff herein, the sum of fifty-nine $\frac{25}{100}$ dollars ($59.25), his costs and disbursements herein.

By the court.

B. LINCOLN BENEDICT, *Clerk.*

28 United States Circuit Court, Eastern District of New York.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant. } Bill of Exceptions.

Be it remembered, that afterward—to wit, on the 27th day of March, in the year of our Lord one thousand eight hundred and ninety-four—at a stated term of said court, begun and holden in Brooklyn, in and for the eastern district of New York, before his honor Hoyt H. Wheeler, district judge, duly assigned to hold said court, the issue joined in the above-stated cause between said parties, under the pleadings herein, came on to be heard before the said judge and a jury, the plaintiff being represented by Messrs. Logan, Clark & Demond, his attorneys, and the defendant being represented by Messrs. Coudert Bros., his attorneys, and upon the trial of that issue the attorneys for the said plaintiff, to maintain and prove the said issue on plaintiff's part, offered the following evidence, and the following proceedings were had, this bill of exceptions containing all of the evidence given on said trial.

29 The jury having been empannelled and sworn, the counsel for plaintiff opens the case, and thereupon EMMET R. OLCOTT was duly sworn and examined as a witness for the plaintiff, and testified as follows:

I am a lawyer, and have been since 1873 or 1874. My firm is Olcott, Mestre & Gonzalez, and has a specialty in questions of foreign law, in countries especially of Spanish origin. My firm are the lawyers for the Spanish government, Mexican government, and various of the republics of Central and South America. My firm have made a specialty of questions of foreign law, and in that connection have had business to do with persons dealing with the Kingdom of Spain, and republics in countries having their origin from Spain, in the way of government, countries on this continent wherever the Spanish language is spoken, including Venezuela. We now represent the consular representatives and ministers of various of those countries.

Q. And you have delivered opinions on such subjects?

A. We are constantly called on to deliver opinions on questions relating to foreign law, and the laws of these countries I mention. Our opinion has been taken on different occasions, and is taken and accepted as showing the law of those countries by the authorities of the city of Brooklyn, New York, of the United States Treasury Department, and by corporations and individuals generally. I am familiar in general with the form in which the body of civil law exists in Venezuela, and did in 1892. The ordinary civil law in Venezuela is in the form of a code.

The plaintiff's counsel produces a book, purporting to be the Code of Venezuela, and the defendant's counsel, conceding that the book is the official copy of the code of that country at its date, 1874, but objecting that it is not evidence of the present law, the court admits the book as a printed code and being the law of that country.

30 The book is marked "Plaintiff's Exhibit 1, March 27, 1894."

Thereupon, at the request of the plaintiff's counsel, the witness translated various portions of said book, as follows:

"Law 6, article 24. As to persons liable civilly for crimes and misdemeanors.

Article 24. Every person, liable criminally for any crime or misdemeanor, is also liable civilly."

Law 7, article 30. Liability civilly fixed under the last preceding law includes (here follows the numbered lists) "First, restitution; second, reparation for the injury inflicted; third, indemnity for damages."

Article 31 is as to restitution. Article 32 is as to reparation. Article 33 is as to indemnity for damages. Article 34 provides that obligations of the last preceding article under the law shall extend to the representatives of the party liable.

Article 389 under law 6, as to violence, reads: "Violence against persons is committed:

(Subsection 2). By taking them into possession, detaining them or taking them from one place to another against their will, by physical force, similated authority or the use of threats.

(Subsection 3). Forcing them to do acts that they may rightfully refuse to do or to refrain from others not prohibited to them by the use of the same means.

(Subsection 4). Seriously threatening to do or cause a grievous wrong.

(Subsection 5). Entering in their houses or on their lands against their inhibition.

(Subsection 6). Taking things in their possession, with the motive of payment or indemnity."

Article 391, under the same law, reads, "Whoever commits the violence described in sub-section 2 of such article, 389, shall be punished by imprisonment for the period of from six to eighteen months, and if the secreting or detention do not exceed forty-eight

hours, by imprisonment during the period of from one to
31 six months. Such violence is also committed when the person secreted by the person committing it be required to appear personally by any person or public official having right so to require."

Thereupon the plaintiff's counsel offered in evidence the constitution of Venezuela, which was received in evidence and marked Plaintiff's Exhibit 2, March 27, 1894.

The plaintiff's counsel thereupon read to the jury extracts from said constitution of 1891, as follows:

"Article 14. The nation guarantees to Venezuelans:

First. The inviolability of life, capital punishment being abolished in spite of any law that establishes it.

Second. Property, with all its attributes, rights and privileges, will be only subjected to contributions decreed by legislative authority to judicial decision, and to be taken for public works after indemnity and condemnation.

Third. The inviolability and secrecy of correspondence and other private papers.

Fourth. The domestic hearth that cannot be approached, except to prevent the perpetration of crime, and this itself must be done in accordance with law.

Fifth. Personal liberty, and consequently (1) forced recruiting for armed service is abolished; (2) slavery is forever proscribed; (3) slaves that tread the soil of Venezuela are free; and (4) nobody is obliged to do that which the law does not command, nor is impeded from doing that which it does not prohibit."

Plaintiff's counsel also read from article 10, title I of said constitution, as follows: "Foreigners shall enjoy the same civil rights as Venezuelans and the same security in their persons and property."

Mr. COUDERT: Don't you finish it?

Mr. CLARK, plaintiff's counsel: "Certainly. They can only take advantage of diplomatic means in accordance with public treaties and in cases when right permits it."

This constitution is dated the 9th day of April, 1891, and a copy of the whole constitution was marked Plaintiff's Exhibit 2, March 27, 1894, as follows:

32 CONSTITUTION OF THE UNITED STATES OF VENEZUELA.

TITLE I.

The Nation.

SECTION 1.—*Of the Territory.*

Article 1. The States that the constitution of March 28, 1864, declared independent and united to form the Venezuelan federation, and that on April 27, 1881, were denominated Apure, Bolivar, Barquisimeto, Barcelona, Carabobo, Cojedes, Cumana, Falcon, Guzman Blanco, Guarico, Guana, Guzman, Maturin, Nueva Esparta,

Portuguesa, Tachira, Trujillo, Yaracuy, Zamora and Zulia are constituted into nine grand political bodies, viz:

The State of Bermudez, composed of Barcelona, Cumana and Maturin; the State of Miranda, composed of Bolivar, Guzman Blanco, Guarico and Neuva Esparta; the State of Carabobo, composed of Carabobo and Nirgua; the State of Zamora, composed of Cojedes, Portuguesa and Zamora; the State of Lara, composed of Barquisimeto and Yaracuy, except the department of Nirgua; the State of Los Andes, composed of Guzman, Trujillo and Tachira; the State of Bolivar, composed of Guayana and Apure; the State of Zulia, and also the State of Falcon.

And they are thus constituted to continue one only nation, free, sovereign and independent, under the title of the United States of Venezuela.

Art. 2. The boundaries of these great States are determined by those that the law of April 28, 1856, that arranged the last territorial division, designated for the ancient provinces until it shall be reformed.

Art. 3. The boundaries of the United States of the Venezuelan federation are the same that in 1810 belonged to the old captaincy general of Venezuela.

33 Art. 4. The States that are grouped together to form the grand political bodies will be called sections. These are equal among themselves; the constitutions prescribed for their internal organism must be harmonious with the federative principles established by the present compact, and the sovereignty not delegated resides in the State without any other limitations than those that devolve from the compromise of association.

SECTION II.—*Of Venezuelans.*

Art. 5. These are Venezuelans, viz:

First. All persons that may have been or may be born on Venezuelan soil, whatever may be the nationality of their parents.

Second. The children of a Venezuelan father or mother that may have been born on foreign soil, if they should come to take up their domicile in the country and express the desire to become citizens.

Third. Foreigners that may have obtained naturalization papers; and

Fourth. Those born or that shall be born in any of the Spanish-American republics or in the Spanish Antilles, provided that they may have taken up their residence in the territory of the republic and express a willingness to become citizens.

Art. 6. Those that take up their residence and acquire nationality in a foreign country do not lose the character of Venezuelans.

Art. 7. Males over twenty-one years of age are qualified Venezuelan citizens with only the exceptions contained in this constitution.

Art. 8. All Venezuelans are obliged to serve the nation according to the prescriptions of the laws, sacrificing his property and his life, if necessary, to defend the country.

Art. 9. Venezuelans shall enjoy, in all the States of the Union, the rights and immunities inherent to their condition as citizens of the federation, and they shall also have imposed upon
34 them there the same duties that are required of those that are natives or domiciled there.

Art. 10. Foreigners shall enjoy the same civil rights as Venezuelans and the same security in their persons and property. They can only take advantage of diplomatic means in accordance with public treaties and in cases when right permits it.

Art. 11. The law will determine the rights applicable to the condition of foreigners, according as they may be domiciled or in transit.

TITLE II.

Bases of the Union.

Art. 12. The States that form the Venezuelan federation reciprocally recognize their respective autonomies; they are declared equal in political entity, and preserve, in all its plenitude, the sovereignty not expressly delegated in this constitution.

Article 13. The States of the Venezuelan federation oblige themselves:

First. To organize themselves in accord with the principles of popular, elective, federal, representative, alternative, and responsible government.

Second. To establish the fundamental regulations of their interior regulation and government in entire conformity with the principles of this constitution.

Third. To defend themselves against all violence that threatens the sectional independence or the integrity of the Venezuelan federation.

Fourth. To not alienate to a foreign power any part of their territory, nor to implore its protection, nor to establish or cultivate political or diplomatic relations with other nations since this last is reserved to the federal power.

Fifth. To not combine or ally themselves with another nation, nor to separate themselves to the prejudice of the nationality of Venezuela and her territory.

35 Sixth. To cede to the nation the territory that may be necessary to the federal district.

Seventh. To cede to the government of the federation the territory necessary for the erection of forts, warehouses, ship yards and penitentiaries, and for the construction of other edifices indispensable to the general administration.

Eighth. To leave to the government of the federation the administration of the Amizonas and Goajira territories, and that of the islands which pertain to the nation, until it may be convenient to elevate them to another rank.

Ninth. To reserve to the powers of the federation all legislative or executive jurisdiction concerning maritime, coastwise and fluvial navigation, and the national roads, considering as such those that

exceed the limits of a State and lead to the frontiers of others and to the federal district.

Tenth. To not subject to contributions the products or articles upon which national taxes are imposed or those that are by law exempt from tax before they have been offered for consumption.

Eleventh. To not impose contributions on cattle, effects or any class of merchandise in transit for another State, in order that traffic may be absolutely free, and that in one section the consumption of others may not be taxed.

Twelfth. To not prohibit the consumption of the products of other States nor to tax their productions with greater general or municipal taxes than those paid on products raised in the locality.

Thirteenth. To not establish maritime or territorial custom-houses for the collection of imports, since there will be national ones only.

Fourteenth. To recognize the right of each State to dispose of its natural products.

Fifteenth. To cede to the government of the federation the administration of mines, public lands and salt mines, in order that the first may be regulated by a system of uniform working, and that the latter may be applied to the benefit of the people.

36 Sixteenth. To respect the property, arsenals and forts of the nation.

Seventeenth. To comply with and cause to be complied with and executed the constitution and laws of the federation and the decrees and orders that the federal power, the tribunals and courts may expedite in use of their attributes and legal faculties.

Eighteenth. To give entire faith to and to cause to be complied with and executed the public acts and judicial procedures of the other States.

Nineteenth. To organize their tribunals and courts for the administration of justice in the State and to have for all of them the same substantive civil and criminal legislation and the same laws of civil and criminal procedure.

Twentieth. To present judges for the court of appeals and to submit to the decision of this supreme tribunal of the States.

Twenty-first. To incorporate the extradition of criminals as a political principle in their respective constitutions.

Twenty-second. To establish direct and public suffrage in popular elections, making it obligatory and endorsing it in the electoral registry. The vote of the suffragist must be cast in full public session of the respective board-; it will be inscribed in the registry books that the law prescribes for elections, which cannot be substituted in any other form, and the elector, for himself or by another at his request in case of impediment or through ignorance, will sign the memorandum entry of his vote, and without this requisite it cannot be claimed that in reality he has voted.

Twenty-third. To establish a system of primary education and that of arts and trades.

Twenty-fourth. To reserve to the powers of the federation the laws and provisions necessary for the creation, conservation and

progress of general schools, colleges, or universities designed for the teaching of the sciences.

Twenty-fifth. To not impose duties upon the national em-
37 ployés, except in the quality of citizens of the State, and insomuch as these duties may not be incompatible with the national public service.

Twenty-sixth. To furnish the proportional contingent that pertains to them to compose the national public forces in time of peace or war.

Twenty-seventh. To not permit in the States of the federation forced enlistments and levies that have or may have for their object an attack on liberty or independence, or a disturbance of the public order of the nation, of other States, or of another nation.

Twenty-eighth. To preserve a strict neutrality in the contentions that may arise in other States.

Twenty-ninth. To not declare or carry on war in any case, one State with another.

Thirtieth. To defer and submit to the decision of the congress or the high federal court in all the controversies that may arise between two or more States when they cannot, between themselves and by pacific measures, arrive at an agreement. If, for any cause, they may not designate the arbiter to whose decision they may submit, they leave it, in fact, to the high federal court.

Thirty-first. To recognize the competency of congress and of the court of appeals to take cognizance of the causes that, for treason to the country or for the infraction of the constitution and laws of the federation, may be instituted against those that exercise executive authority in the States, it being their duty to incorporate this precept in their constitutions. In these trials the modes of procedure that the general laws prescribe will be followed and they will be decided in consonance with those laws.

Thirty-second. To have as the just income of the States, two-thirds of the total product of the impost collected as transit tax in all the custom-houses of the Republic and two-thirds of that collected from mines, public lands and salt mines administered by the federal power, and to distribute this income among all the States of the federation in proportion to the population of each.

38 Thirty-third. To reserve to the federal power the amount of the third part of the income from transit tax, the production of mines, public lands and salt mines, to be invested in the improvement of the country.

Thirty-fourth. To keep far away from the frontier those individuals that, through political motives, take refuge in a State, provided that the State interested requests it.

TITLE III.

Guarantees of Venezuelans.

Article 14. The nation guarantees to Venezuelans:

First. The inviolability of life, capital punishment being abolished in spite of any law that established it.

Second. Property, with all its attributes, rights and privileges, will only be subjected to contributions decreed by legislative authority, to judicial decision, and to be taken for public works after indemnity and condemnation.

Third. The inviolability and secrecy of correspondence and other private papers.

Fourth. The domestic hearth, that cannot be approached except to prevent the perpetration of crime, and this itself must be done in accordance with law.

Fifth. Personal liberty, and consequently (1) forced recruiting for armed service is abolished; (2), slavery is forever proscribed; (3), slaves that tread the soil of Venezuela are free, and (4), nobody is obliged to do that which the law does not command, nor is impeded from doing that which it does not prohibit.

Sixth. The freedom of thought, expressed by word or through the press, is without any restriction to be submitted to previous censure. In case of calumny or injury or prejudice to a third party, the aggrieved party shall have every facility to have his complaints investigated before competent tribunals of justice in accordance with the common laws.

Seventh. The liberty of traveling without passport, to
39 change the domicile, observing the legal formalities, and to depart from and return to the Republic, carrying off and bringing back his or her property.

Eighth. The liberty of industry and consequently the proprietorship of discoveries and productions. The law will assign to the proprietors a temporary privilege or the mode of indemnity in case that the author agrees to its publication.

Ninth. The liberty of reunion and assembling without arms, publicly or privately, the authorities being prohibited from exercising any act of inspection or coercion.

Tenth. The liberty of petition, with the right of obtaining action by resolution; petition can be made by any functionary, authority or corporation. If the petition shall be made in the name of various persons, the first five will respond for the authenticity of the signatures and all for the truth of the assertions.

Eleventh. The liberty of suffrage at popular elections without any restrictions, except to males under eighteen years of age.

Twelfth. The liberty of instruction will be protected to every extent. The public power is obliged to establish gratuitous instruction in primary schools, the arts and trades.

Thirteenth. Religious liberty.

Fourteenth. Individual security, and therefore (1) no Venezuelan can be imprisoned or arrested in punishment for debts not founded in fraud or crime; (2) nor to be obliged to lodge or quarter soldiers in his house; (3) nor to be judged by special commissions or tribunals, but by his natural judges and by virtue of laws dictated before the commission of the crime or act to be judged; (4) nor to be imprisoned nor arrested without previous summary information that a crime meriting corporal punishment has been committed, and a written order from the functionary that orders the imprisonment,

stating the cause of arrest, unless the person may be caught in the commission of the crime; (5) nor to be placed in solitary confinement for any cause; (6) nor to be obliged to give evidence, in criminal causes, against himself or his blood relations within the fourth degree of consanguinity or against his relations by marriage within the second degree, or against husband or wife; (7) nor to remain in prison when the reasons that caused the imprisonment have been dissipated; (8) nor to be sentenced to corporal punishment for more than ten years; (10) nor to remain deprived of his liberty for political reasons when order is re-established.

Art. 15. Equality: in virtue of which (1) all must be judged by the very same laws and subject to equal duty, service and contributions; (2) no titles of nobility, hereditary honors and distinctions will be conceded, nor employments or offices the salaries or emoluments of which continue after the termination of service; (3) no other official salutation than "citizen" and "you" will be given to employees and corporations.

The present enumeration does not impose upon the States the obligation to accord other guarantees to their inhabitants.

Art. 16. The laws in the States will prescribe penalties for the infractions of these guarantees, establishing modes of procedure to make them effective.

Art. 17. Those who may issue, sign or execute or order executed any decrees, orders or resolutions that violate or in any manner infringe upon the guarantees accorded to Venezuelans are culpable and must be punished according to the law. Every citizen is empowered to bring charges.

TITLE IV.

Of the National Legislature.

SECTION I.

Art. 18. The national legislature will be composed of two chambers, one of senators and another of deputies.

41 Art. 19. The States will determine the mode of election of deputies.

SECTION II.—*Of the Chamber of Deputies.*

Art. 20. To form the chamber of deputies, each State will name, by popular election in accordance with paragraph 22 of article 13 of this constitution, one deputy for each thirty-five thousand inhabitants, and another for an excess not under fifteen thousand. In the same manner it will elect alternates in equal number to the principals.

Art. 21. The deputies will hold office for four years, when they will be renewed in their entirety.

Art. 22. The prerogatives of the chamber of deputies are: First, to examine the annual account that the President of the United

States of Venezuela must render; second, to pass a vote of censure of the ministers of the cabinet, in which event their posts will be vacant; third, to hear charges against the persons in charge of the office of the national executive for treason to the country, for infraction of the constitution, or for ordinary crimes; against the ministers and other national employees for infraction of the constitution and laws and for fault in the discharge of their duties according to article 75 of this constitution and the general laws of the Republic. This attribute is preventative, and neither contracts nor diminishes those that other authorities have to judge and punish.

Art. 23. When a charge is instituted by a deputy or by any corporation or individual, the following rules will be observed: (1) There will be appointed, in secret session, a commission of three deputies; (2) the commission will, within three days, render an opinion, declaring whether or not there is foundation for instituting a cause; (3) the chamber will consider the information and decide upon the cause by the vote of an absolute majority of the members present, the accusing deputy abstaining from voting.

42 Art. 24. The declaration that there is foundation for the cause operates to suspend from office the accused and incapacitates him for the discharge of any public function during the trial.

SECTION III.—*Of the Chamber of the Senate.*

Art. 25. To form this chamber each State, through its respective legislature, will elect three principal senators and an equal number of alternates, to supply the vacancies that may occur.

Art. 26. To be a senator it is required that he shall be a Venezuelan by birth and thirty years of age.

Art. 27. The senators will occupy their posts for four years and be removed in their entirety.

Art. 28. It is the prerogative of the senate to substantiate and decide the causes initiated in the chamber of deputies.

Art. 29. If the cause may not have been concluded during the sessions, the senate will continue assembled for this purpose only until the cause is finished.

SECTION IV.—*Dispositions of the Chamber in Common.*

Art. 30. The national legislature will assemble on the 20th day of February of each year, or as soon thereafter as possible, at the capital of the United States, without the necessity of previous notice. The sessions will last for seventy days, to be prolonged until ninety days, at the judgment of the majority.

Art. 31. The chamber will open their sessions with two-thirds of their number at least; and, in default of this number, those present will assemble in a preparatory commission and adopt measures for the concurrence of the absentees.

Art. 32. The sessions having been opened, they may be continued by two-thirds of those who may have installed them, provided that the number is not less than half of all the members elected.

43 Art. 33. Although the chambers deliberate separately, they may assemble together in congress when the constitution and laws provide for it, or when one of the two chambers may deem it necessary. If the chamber that is invited shall agree, it remains to it to fix the day and the hour of the joint session.

Art. 34. The sessions will be public and secret at the will of the chamber.

Art. 35. The chambers have the right: (1) to make rules to be observed in the sessions and to regulate the debates; (2) to correct infractors; (3) to establish the police force in the hall of sessions; (4) to punish or correct spectators who create disorder; (5) to remove the obstacles to the free exercise of their functions; (6) to command the execution of their private resolutions; (7) to judge of the qualifications of their members, and to consider their resignations.

Art. 36. One of the chambers cannot suspend its sessions nor change its place of meeting without the consent of the other; in case of disagreement they will reassemble together and execute that which the majority resolves.

Art. 37. The exercise of any other public function, during the sessions, is incompatible with those of a senator or deputy. The law will specify the remuneration that the members of the national legislature shall receive for their services.

And whenever an increase of said remunerations is decreed, the law that sanctions it will not begin to be in force until the following period, when the chambers that sanctioned it shall have been renewed in their entirety.

Art. 38. The senators and deputies shall enjoy immunity from the 20th day of January of each year until thirty days after the close of the sessions, and this consists in the suspension of all civil or criminal proceeding, whatever may be its origin or nature; when
44 any one shall perpetrate an act that merits corporal punishment, the investigation shall continue until the end of the summing up, and shall remain in this state while the term of immunity continues.

Art. 39. The congress will be presided over by the president of the senate and the presiding officer of the chamber of deputies will act as vice-president.

Art. 40. The members of the chambers are not responsible for the opinions they express or the discourses they pronounce in session.

Art. 41. Senators and deputies that accept office or commission from the national executive thereby leave vacant the post of legislators in the chambers to which they were elected.

Art. 42. Nor can senators and deputies make contracts with the general government or conduct the prosecution of claims of others against it.

SECTION V.—*Prerogatives of the National Legislature.*

Art. 43. The national legislature has the following prerogatives: (1) to dissolve the controversies that may arise between two or more States; (2) to locate the federal district in an unpopulated territory

not exceeding three miles square, where will be constructed the capital city of the Republic. This district will be neutral territory, and no other elections will be there held than those that the law determines for the locality. The district will be provisionally that which the constituent assembly designated or that which the national legislature may designate; (3) to organize everything relating to the custom-houses, whose income will constitute the treasure of the Union until those incomes are supplied from other sources; (4) to dispose in everything relating to the habitation and security of ports and seacoasts; (5) to create and organize the postal service and to fix the charges for transportation of correspondence; (6) to form the national codes in accordance with paragraph 19, article 13 of this constitution; (7) to fix the value, type, law, weight and coinage of national money, and to regulate the admission and circulation of foreign money; (8) to designate the coat of arms and the national flag which will be the same for all the States; (9) to create, abolish and fix salaries for national offices; (10) to determine everything in relation to the national debt; (11) to contract loans upon the credit of the nation; (12) to dictate necessary measures to perfect the census of the current population and the national statistics; (13) to annually fix the armed forces by sea and land and to dictate the army regulations; (14) to decree rules for the formation and substitution of the forces referred to in the preceding clause; (15) to declare war and to require the national executive to negotiate peace; (16) to ratify or reject the contracts for national public works made by the president with the approval of the federal council, without which requisite they will not be carried into effect; (18) to annually fix the estimates for public expenses; (19) to promote whatever conduces to the prosperity of the country and to its advancement in the general knowledge of the arts and sciences; (20) to fix and regulate the national weights and measures; (21) to grant amnesties; (22) to establish, under the names of territories, special regulations for the government of regions inhabited by unconquered and uncivilized Indians. Such territories will be under the immediate supervision of the executive of the Union; (23) to establish the modes of procedure and to designate the penalties to be imposed by the senate in the trials originated in the chamber of deputies; (24) to increase the basis of population for the election of deputies; (25) to permit or refuse the admission of foreigners into the service of the Republic; (26) to make laws in respect to retirements from the military service and army pensions; (27) to dictate the law of responsibility on the part of all national employés and those of the States for infraction of the constitution and the general laws of the Union; (28) to determine the mode of conceding military rank or promotion; (29) to elect the federal council provided for in this constitution and to revoke the alternates of the senators and deputies who may have been chosen for it.

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Art. 44. Besides the preceding enumeration the national legislature may pass such laws of a general character as may be necessary, but in no case can they be promulgated, much less executed, if they

conflict with this constitution, which defines the prerogatives of the public powers in Venezuela.

SECTION VI.—*Of the Making of Laws.*

Art. 45. The laws and decrees of the national legislature may be proposed by the members of either chamber, provided that the respective projects are conformed to the rules established for the parliament of Venezuela.

Art. 46. After a project may have been presented, it will be read and considered in order to be admitted; and if it is, it must undergo three discussions, with an interval of at least one day between each, observing the rules established for debate.

Art. 47. The projects approved in the chamber in which they were originated will be passed to the other for the purposes indicated in the preceding article, and if they are not rejected they will be returned to the chamber whence they originated, with the amendments they may have undergone.

Art. 48. If the chamber of their origin does not agree to the amendments, it may insist and send its written reasons to the other. They may also assemble together in congress and deliberate, in general commission, over the mode of agreement, but if this cannot be reached, the project will be of no effect after the chamber of its origin separately decides upon the ratification of its insistence.

47 Art. 49. Upon the passing of the projects from one to the other chamber, the days on which they have been discussed will be stated.

Art. 50. The law reforming another law must be fully engrossed and the former law in all its parts, will be annulled.

Art. 51. In the laws this form will be used: "The Congress of the United States of Venezuela decrees."

Art. 52. The projects defeated in one legislature cannot be reintroduced except in another.

Art. 53. The projects pending in a chamber at the close of the sessions must undergo the same three discussions in succeeding legislatures.

Art. 54. Laws are annulled with the same formalities established for their sanction.

Art. 55. When the ministers of cabinet may have sustained in a chamber, unconstitutionality of a project by word or in writing, and, notwithstanding this, it may have been sanctioned as law, the national executive, with the affirmative vote of the federal council, will suspend its execution and apply to the legislatures of the States, asking their vote in the matter.

Art. 56. In case of the foregoing article, each State will represent one vote expressed by the majority of the members of the legislature present, and the result will be sent to the high federal court in this form "I confirm" or "I reject."

Art. 57. If a majority of the legislatures of the States agree with the federal executive, the high federal court will confirm the suspension and the federal executive himself will render an account

to the next congress relative to all that has been done in the matter.

Art. 58. The laws will not be observed until after being published in the solemn form established.

48 Art. 59. The faculty conceded to sanction a law is not to be delegated.

Art. 60. No legislative disposition will have a retroactive effect, except in matters of judicial procedure and that which imposes a lighter penalty.

TITLE V.

Of the General Power of the Federation.

Art. 61. There will be a federal council composed of one senator and one deputy for each State and of one more deputy for the federal district, who will be elected by the congress each two years from among the respective representations of the States composing the federation and from that federal district.

This election will take place in the first fifteen days of the meeting of congress, in the first and third year of the constitutional period.

Art. 62. The federal council elects from its members the President of the United States of Venezuela, and in the same manner the person who shall act in his stead in case of his temporal or permanent disability during his term. The election of a person to be President of the United States of Venezuela who is not a member of the federal council, as well as of those who may have to act in his stead in case of his temporal or permanent disability, is null of right and void of efficiency.

Art. 63. The members of the federal council hold office for two years, the same as the President of the United States of Venezuela, whose term is of equal duration; and neither he nor they can be reelected for the term immediately succeeding, although they may return to occupy their posts as legislators in the chambers to which they belong.

Art. 64. The federal council resides in the district and exercises the functions prescribed in the constitution. It cannot de-

49 liberate with less than an absolute majority of all its members; it dictates the interior regulations to be observed in its deliberations, and annually appoints the person who shall preside over its sessions.

SECTION I.

Art. 65. The prerogatives of the President of Venezuela are: (1) To appoint and remove the cabinet ministers; (2) to preside over the cabinet, in whose discussions he will have a vote, and to inform the council of all the matters that refer to the general administration; (3) to receive and welcome public ministers; (4) to sign the official letters to the sovereigns or presidents of other countries; (5) to order the execution of the laws and decrees of national legislature, and to take care that they are complied with and executed;

(6) to promulgate the resolutions and decrees that may have been proposed and received the approbation of the federal council, in conformity with article 66 of this constitution; (7) to organize the federal district and to act therein as the chief civil and political authority established by this constitution; (8) to issue registers of navigation to national vessels; (9) to render an account to Congress, within the first eight days of its annual session, of the cases in which, with the approval of the federal council, he may have exercised all or any of the faculties accorded to him in article 66 of this compact; (10) to discharge the other functions that the national laws entrust to him.

Art. 66. Besides the foregoing prerogatives, that are personal to the President of the United States of Venezuela, he can, with the deliberate vote of the federal council, exercise the following: (1) To protect the nation from all exterior attack; (2) to administer the public lands, mines and salt mines of the States as their delegates; (3) to convoke the national legislature in its regular sessions, and in extraordinary session when the gravity of any subject demands it; (4) to nominate persons for diplomatic positions, consuls general and consuls; those named for the first and second positions must be Venezuelans by birth; (5) to direct negotiations and celebrate all kinds of treaties with other nations, submitting these to the national legislature; (6) to celebrate contracts of national interest in accordance with the laws, and to submit them to the legislatures for their approval; (7) to nominate the employees of hacienda, which nominations are not to be made by any other authority. It is required that these employees shall be Venezuelan by birth; (8) to remove and suspend employees of his own free motion, ordering them to be tried if there should be cause for it; (9) to declare war in the name of the Republic when congress shall have decreed it; (10) in the case of foreign war he can, first, demand from the States the assistance necessary for the national defense; second, require, in anticipation, the contributions and negotiate the loans decreed by the national legislature; third, arrest or expel persons who pertain to the nation with which war is carried on and who may be opposed to the defense of the country; fourth, to suspend the guaranties that may be incompatible with the defense of the country, except that of life; fifth, to select the place to which the general power of the federation may be provisionally translated when there may be grave reasons for it; sixth, to bring to trial for treason to the country those Venezuelans who may be, in any manner, hostile to the national defense; seventh, to issue registers to corsairs and privateers, and to prescribe the laws that they must observe in cases of capture; (11) to employ the public force and the powers contained in numbers 1, 2 and 5 of the preceding clause, with the object of re-establishing constitutional order in case of armed insurrection against the institutions of the nation; (12) to dispose of the public force for the purpose of quelling every armed collision between two or more States, requiring them to lay down their arms and submit their controversies to the arbitration to which they are pledged by number 30, article 14 of this constitution; (13)

to direct the war and to appoint the person who shall com-
51 mand the army; (14) to organize the national force in time of peace; (15) to concede general or particular exemptions; (16) to defend the territory designated for the federal district when there may be reason to apprehend that it will be invaded by hostile forces.

SECTION II.—*Of the Cabinet Ministers.*

Art. 67. The President of the United States of Venezuela shall have the ministers for his cabinet that the law designates. It will determine their functions and duties and will organize their bureaus.

Art. 68. To be a minister of the cabinet it is required that the person shall be twenty-five years of age, a Venezuelan by birth, or five years of naturalization.

Art. 69. The ministers are the natural and proper organs of the President of the United States of Venezuela. All his acts must be subscribed by them, and without such requisite they will not be complied with, nor executed by the authorities, employees or private persons.

Art. 70. All the acts of the ministers must be conformed to this constitution and the laws; their personal responsibility is not saved, although they may have the written order of the president.

Art. 71. The settlement of all business, except the fiscal affairs of the bureaus, will be determined in the council of ministers, and their responsibility is collective and consolidated.

Art. 72. The ministers, within the five first sessions of each year, will render an account to the chambers of what they may have done or propose to do in their respective branches. They will also render written or verbal reports that may be requested of them, reserving only that which, in diplomatic affairs, it may not be convenient to publish.

52 Art. 73. Within the same period they will present to the national legislature the estimates of public expenditures and the general account of the past year.

Art. 74. The ministers have the right to be heard in the chambers, and are obliged to attend when they may be called upon for information.

Art. 75. The ministers are responsible: (1) For treason to the country; (2) for infraction of this constitution or the laws; (3) for malversation of the public funds; (4) for exceeding the estimates in their expenditures; (5) for subornation or bribery in the affairs under their charge, or in the nominations for public employees; (6) for failure in compliance with the decisions of the federal council.

TITLE VI.

Of the High Federal Court.

SECTION I.—*Of Its Organization.*

Art. 76. The high federal court will be composed of as many judges as there may be States of this federation, with the following

qualities: (1) A judge must be a Venezuelan by birth; (2) he must be thirty years of age.

Art. 77. For the nomination of judges of the high federal court the congress will convene on the fifteenth day of its regular sessions, and will proceed to group together the representation of each State from which to form a list of as many candidates for principal judges, and an equal number of alternates as there may be States of the federation. The congress, in the same or following session, will elect one principal and one alternate for each State, selecting them from the respective list.

Art. 78. The law will determine the different functions of the judges and other officers of the high federal court.

53 Art. 79. The judges and their respective alternates will hold office for four years. The principals and their alternates in office cannot accept during this period any office in the gift of the executive without previous resignation and lawful acceptance. The infraction of this disposition will be punished with four years of disability to hold public office in Venezuela.

SECTION II.—*Prerogatives of the High Federal Court.*

Art. 80. The matters within the competence of the high federal court are: (1) To take cognizance of civil or criminal causes that may be instituted against diplomatic officers in those cases permitted by the law of nations; (2) to take cognizance of causes ordered by the president to be instituted against cabinet ministers when they may be accused according to the cases provided for in this constitution. In the matter of the necessity of suspension from office they will request the president to that effect, and he will comply; (4) to have jurisdiction of the causes of responsibility instituted against diplomatic agents accredited to another nation for the wrong discharge of their functions; (5) to have jurisdiction in civil trials when the nation is defendant and the law sanctions it; (6) to dissipate the controversies that may arise between the officials of different States in political order in the matter of jurisdiction or competence; (7) to take cognizance of all matters of political nature that the States desire to submit for their consideration; (8) to declare which may be the law in force when the national and State laws may be found to conflict with each other; (9) to have jurisdiction in the controversies that may result from contracts or negotiations celebrated by the president of the federation; (10) to have jurisdiction in causes of imprisonment; (11) to exercise other prerogatives provided for by law.

54 TITLE VII.

Of the Court of Appeals.

Art. 81. The court of appeals referred to in paragraph 20, article 13, of this constitution, is the tribunal of the States; it will be composed of as many judges as there are States of the federation, and their term of office will last for four years.

Art. 82. A judge of the court of appeals must have the following qualifications: (1) He must be an attorney-at-law in the exercise of his profession, and must have had at least six years' practice; (2) he must be a Venezuelan, thirty years of age.

Art. 83. Every four years the legislature of each State will form a list of as many attorneys, with the qualifications expressed in the preceding article, as there are States, and will remit it, duly certified, to the federal council, in order that this body from the respective lists may select a judge from each State in the organization of this high tribunal.

Art. 84. After the federal council may have received the lists from all the States it will proceed, in public session, to verify the election; forming thereafter a list of the attorneys not elected, in order that from this general list, which will be published in the official paper, the permanent vacancies that may occur in the court of appeals may be filled by lot. The temporary vacancies will be filled according to law.

Art. 85. The court of appeals will have the following prerogatives: (1) To take cognizance of criminal causes or those of responsibility that may be instituted against the high functionaries of the different States, applying the laws of the States themselves in matters of responsibility, and in case of omission of the promulgation of the law of constitutional precept, it will apply to the cause in question the general laws of the land; (2) to take cognizance and to decide in cases of appeal in the form and terms directed by law; (3) to annually report to the national legislature the difficulties that stand in way of uniformity in the matter of civil or criminal legislation; (4) to dispose of the rivalries that may arise between the officers or functionaries of judicial order in the different States of the federation and amongst those of a single State, provided that the authority to settle them does not exist in the State.

Title VIII.

Complemental Regulations.

Art. 86. The national executive is exercised by the federal council, the President of the United States of Venezuela, or the person who fills his vacanies, in union with the cabinet ministers who are his organs.

The President of Venezuela must be a Venezuelan by birth.

Art. 87. The functions of national executive cannot be exercised outside of the federal district except in the case provided for in number 5, paragraph 10, article 66, of the constitution. When the president, with the approval of the council, shall take command of the army or absent himself from the district on account of matters of public interest that demand it, he cannot exercise any functions and will be replaced by the federal council in accordance with article 62 of this constitution.

Art. 88. Everything that may not be expressly assigned to the

general administration of the nation in this constitution is reserved to the States.

Art. 89. The tribunals of justice in the States are independent; the causes originated in them will be concluded in the same States without any other review than that of the court of appeals in the cases provided for by law.

56 Art. 90. Every act of Congress and of the national executive that violates the rights guaranteed to the States in this constitution, or that attacks their independence, must be declared of no effect by the high court, provided that a majority of the legislatures demands it.

Art. 91. The public national force is divided into naval and land troops, and will be composed of the citizen militia that the States may organize according to law.

Art. 92. The force at the disposal of the federation will be organized from citizens of a contingent furnished by each State in proportion to its population, calling to service those citizens that should render it according to their internal laws.

Art. 93. In case of war the contingent can be augmented by bodies of citizen militia up to the number of men necessary to fill the draft of the national government.

Art. 94. The national government may change the commanders of the public force supplied by the States in the cases and with the formalities provided for the national military law and then their successors will be called for from the States.

Art. 95. The military and civil authority can never be exercised by the same person or corporation.

Art. 96. The nation being in possession of the right of ecclesiastical patronage, will exercise it as the law upon the subject may direct.

Art. 97. The government of the federation will have no other resident employees with jurisdiction or authority in the States than those of the States themselves. The officers of hacienda, those of the forces that garrison national fortresses, arsenals created by law, navy yards, and habilitated ports, that only have jurisdic-

57 tion in matters peculiar to their respective offices and within the limits of the forts and quarters that they command, are excepted; but even these must be subject to the general laws of the State in which they reside. All the elements of war now existing belong to the national government; nevertheless it is not to be understood that the States are prohibited from acquiring those that they may need for domestic defense.

Art. 98. The national government cannot station troops nor military officers with command in a State, although they may be from that or another State, without permission of the government of the State in which the force is to be stationed.

Art. 99. Neither the national executive nor those of the States can resort to armed intervention in the domestic contentions of a State. It is only permitted to them to tender their good offices to bring about a pacific solution in the case.

Art. 100. In case of a permanent or temporary vacancy in the

office of President of the United States of Venezuela, the States shall be immediately informed as to who has supplied the vacancy.

Art. 101. Exportation in Venezuela is free and no duty can be placed upon it.

Art. 102. All usurped authority is without effect and its acts are null. Every order granted for a requisition, direct or indirect, by armed force or by an assemblage of people in subversive attitude, is null of right and void of efficacy.

Art. 103. The exercise of any function not conferred by the constitution or laws is prohibited to every corporation or authority.

Art. 104. Any citizen may accuse the employees of the nation or the States before the chamber of deputies, before their respective superiors in office or before the authorities designated by law.

58 Art. 105. No payment shall be made from the national treasury for which congress has not expressly provided in the annual estimate, and those that may infringe this rule will be civilly responsible to the national treasury for the sums they have paid out. In every payment from the public treasury the ordinary expenses will be preferred to the extraordinary charges.

Art. 106. The offices of collection and disbursement of the national taxes shall be always separate, and the offices of collection may disburse only the salaries of their respective employees.

Art. 107. When, for any reason, the estimate of appropriations for a fiscal period have not been made, that of the immediate preceeding period will continue in force.

Art. 108. In time of elections the public national force or that of the States themselves will remain closely quartered during the holding of popular elections.

Art. 109. In international treaties of commerce and friendship this clause will be inserted, to wit: "All the disagreements between the contracting parties must be decided, without appeal to war, by the decision of friendly powers."

Art. 110. No individual can hold more than one office within the gift of congress and the national executive. The acceptance of any other is equivalent to resignation of the first. Officials that are removable will cease to hold office upon accepting the charge of a senator or deputy when they are dependents of the national executive.

Art. 111. The law will create and designate other national tribunals that may be necessary.

Art. 112. National officers cannot accept gifts, commissions, honors or emoluments from a foreign nation without permission from the national legislature.

59 Art. 113. Armed force cannot deliberate; it is passive and obedient. No armed body can make requisitions nor demand assistance of any kind but from the civil authorities and in the mode and form prescribed by law.

Art. 114. The nation and the States will promote foreign immigration and colonization in accordance with their respective laws.

Art. 115. The law will regulate the manner in which national

officers, upon taking charge of their post, shall take the oath to comply with their duties.

Art. 116. The national executive will negotiate with the Government of America over treaties of alliance and confederation.

Art. 117. The law of nations forms a part of the national legislature. Its dispositions will be specially in force in cases of civil war, which can be terminated by treaties between the belligerents, who will have to respect the humanitarian customs of Christians and civilized nations, the guarantee of life being, in every case, inviolable.

Art. 118. This constitution can be reformed by the national legislature if the legislatures of the States desire it, but there shall never be any reform except in the parts upon which the majority of the States coincide; also a reform can be made upon one or more points when two-thirds of the members of the national legislature, deliberating separately and by the proceedings established to sanction the laws, shall accord it; but, in the second case, the amendment voted shall be submitted to the legislature of the States, and it will stand sanctioned in the point or points that may have been ratified by them.

Art. 119. This constitution will take effect from the day of its official promulgation in each State, and in all public acts and official documents there will be cited the date of the federation to begin with February 20, 1859, and the date of the law to begin with March 28, 1864.

Art. 120. The constitutional period for the offices of the general administration of the republic will continue to be computed from February 20, 1882, the date on which the reformed constitution took effect.

Art. 121. For every act of civil and political life of the States of the federation, its basis of population is that which is determined in the last census approved by the national legislature.

Art. 122. The federal constitution of April 27, 1881, is repealed.

Done in Caracas, in the palace of the federal legislative corps, and sealed with the seal of congress on the 9th day of April, 1891, the 28th year of the law and the 33rd year of the federation.

(Here follow the signatures of the presidents, vice-presidents, and second vice-presidents of the senate and chamber of deputies, together with those of the senators and deputies of the various States, followed by those of the president and members of his cabinet.)

Plaintiff's counsel offered in evidence a letter from the Department of State in this country, dated March 21, 1894, and signed by the acting Secretary. This was admitted in evidence and marked Plaintiff's Exhibit 3, March 27, 1894.

"DEPARTMENT OF STATE,
WASHINGTON, *March* 21, 1894.

Messrs. Logan, Clark & Demond, No. 58 William street, New York city.

GENTLEMEN: In reply to your letter of the 16th instant, I have to

inform you that the present government of Venezuela was
61 formally recognized by this Government on October 23, 1892.
The department is unable to answer your further questions.
I am, gentlemen, your obedient servant,

EDWIN F. UHL,
Acting Secretary."

Thereupon plaintiff's counsel called the plaintiff. GEORGE F. UNDERHILL, as a witness for the plaintiff, who, after being duly sworn, was examined as a witness in his own behalf and testified as follows:

I am forty-nine years old. I was born in Eastchester, Westchester county, New York, and was educated as an engineer. I first went to Venezuela in 1881, and went there under contract, as chief engineer of the El Cal-ao gold mines, 250 or 260 miles from Bolivar, Venezuela. That was the first time I went to Bolivar. I left the gold mine and went to Bolivar after I had completed my contract, about the end of that year. I then returned to the United States, expecting to come back in six months again, to take charge of one of these mines. I went back to Bolivar and made a contract with the local government of Venezuela to build water works. The original contract was returned to the government, when a second one was made, during Blanco Buroz's administration, in 1887. I had to deliver the original contract at Bolivar when I disposed of the water works in 1892. The paper shown me is translation of my contract, the second contract.

Plaintiff's counsel offers the same in evidence. It was objected to by the defendant's counsel as irrelevant and immaterial and as having no bearing upon this case, which is for false imprisonment.

The COURT: I don't see the materiality of it.

Mr. CLARK, plaintiff's counsel: They claim to justify the
62 false imprisonment and the detention there in Bolivar, under the terms of this contract.

The offer of this contract in evidence by the plaintiff's counsel is denied by the court. Whereupon the plaintiff's counsel then and there excepted.

This contract was marked for identification, "Plaintiff's Exhibit 4," and is as follows:

"*Contract.*

Translation.

Dr. V. Blanco Buroz, President of the State of *of* Bolivar sufficiently authorized and George F. Underhill exercising his own rights, both of full age, and residents of this city, have agreed upon the following convention, thereby reforming the contract celebrated between Ramon Amayol, President of the State of Bolivar and George F. Underhill, on the 5th day of October, 1883, for the continuation and maintenance of the acqueduct of Ciudad, Bolivar.

First. The government of the State of Bolivar binds itself:

Art. 1st. To deliver for the term of twelve years, prorogable for three more, and to count from the date of the signing of the present contract, to George F. Underhill, his concessionaires, heirs, or to any company that he may form, in accordance with the commercial code, the full ownership of the acqueduct with all the improvements and additions carried up to this day by the said George F. Underhill, with all its belongings, pipes, pumps, boilers, utensils, tools and all its buildings, viz: the property of the tank whose boundary is as follows: By the north Rosario St., south Progress St., east Constitution St. and west Boyaca St. The property of the pumps, office and workshops situated behind the market and on the shores of the Orinoco river.

Art. 2nd. To obtain from the national government an order
63 to the chiefs of the custom-house of this port, and for the free introduction of all the materials and effects required for the conclusion, extension and preservation of the aqueduct, and during the time that this contract lasts.

Art. 3d. To sanction the regulations which may be established for the good working of the acqueduct and for the collection of the water tax.

Art. 4th. To guarantee to George F. Underhill or to those to whom he may transfer the present contract the exclusive right to extend the pipes necessary to supply the water to this city, not only the mains in the streets but those in the houses, and to dig and pave the streets and make the necessary repairs to the pipes that are laid or may be laid during the term of his contract.

Second. George F. Underhill binds himself—

Art. 1st. To continue with the work of the aqueduct and keep it in good condition so as to supply the water to the city for the term of twelve years, prorogable for three more, from the date of the signing of the present contract and according to what is stipulated.

Art. 2nd. To supply the water by means of said pipes, all cases of unforeseen accidents and force may be excepted, during six hours in the morning, for which end he will have all the necessary machinery and utensils and duplicates required in case of breakage, etc., so as to comply with what is stipulated above.

Art. 3rd. To extend the pipes (in the streets) in the term of six months after the signing of the present contract in the streets stipulated to the register kept by the municipal council of the district house.

Art. 4th. To continue supplying water gratis by means of the pipes of the aqueduct the following: Government house, National College, palace, public jail, hospitals, caridad and
64 las mercedes; Plaza Bolivar, arismendi and market, fountains of the porvenir and concordia and police barracks.

Art. 5th. To deliver to the treasury of the State of Bolivar ten per cent. of the gross receipts of the water tax, this to be paid at the end of each quarter, to begin six months after the signing of this contract.

Art. 6th. To return to the municipality of this district the work

of the aqueduct on the termination of the twelve years stipulated in the present contract, including all the belongings, utensils, extensions, repairs and ornaments appertaining to the same in good condition, Underhill or those to whom he may transfer the present contract, being thereby absolutely separated and without any participation or intervention in said works.

Two of the same tenor of this contract are made and signed.

Ciudad Bolivar, April 1st, 1887.

(Signed) V. BLANCO BUROZ.
GEORGE F. UNDERHILL."

I took the management of the water works there and built them.

Q. How much have you expended in building the water works?

Defendant's counsel object to this question as irrelevant and immaterial, which objection was sustained by the court, and the plaintiff's counsel then and there duly excepted.

Q. In 1892, what was it earning for you?

Same objection, ruling and exception.

Q. What had been offered you for the water works by some English parties?

Same objection, ruling and exception.

65 The witness continues: I was engaged in connection with the water works in a repairing business. I was generally called upon for any extra mechanical work by the government, by every government that existed, and by the line of steamers. I frequently repaired steamers. I don't know whether I was the only competent engineer there. There was a great many niggers claimed to be. I generally received the money. I was United States consul at Bolivar for about seven years. I was appointed under Chester Arthur, and gave it up during Harrison's administration. My wife came to Bolivar to live in 1886. These photographs now shown me are photographs of the city of Bolivar.

Counsel for plaintiff offers the photographs in evidence, and they are marked "Plaintiff's Exhibits 5, 6, 7 and 8."

These photographs are not printed in the bill of exceptions, but it is agreed that the originals may be exhibited to the appellate court.

The photograph now shown me is a photograph of my residence taken right after the water works were completed, and the other one now shown me represents the rear entrance of my house. At the time these were taken I was appointed consul. I think it was in 1885.

The last two photographs are admitted in evidence and are marked "Plaintiff's Exhibits 9 and 10."

These photographs are not printed in the bill of exceptions, but it is agreed that the originals may be exhibited to the appellate court.

The house shown in these photographs, numbers 9 and 10, is the house I occupied all the time I was at Bolivar, and I was there from 1882 to 1892. That house was not used for any other purpose while I was there, except for myself and family. It was asked for by the different governments several times. It was only used by myself and family.

66 The plan of the city of Bolivar, now shown me, I made myself from memory a day or two ago.

The plan is offered in evidence and marked "Plaintiff's Exhibit No. 11."

This original plan is not printed in the bill of exceptions, but it is agreed that the original may be exhibited to the appellate court.

The different descriptions of places and houses there, as stated on the plan, are as they were in the summer of 1892. I was acquainted with the political troubles, more or less, in Bolivar in 1892. They began along about May or June. They began to bother us then. Gen. Crespo was the revolutionary, the opposition party, against the then present government. I didn't learn of his success until after I got into Trinidad, the 20th of October.

It is admitted by counsel that the revolution succeeded and Crespo entered Caracas on the 6th of October, 1892.

I knew the defendant in the summer of 1892. I met him in Bolivar before August. I knew him to be breeding up in that part of the country a revolution against the government. I met him at the Hotel Bolivar. He was not connected with the government in any way. I knew him as being in revolution against the government. He was arrested by the government authorities in Bolivar at one time. I believe they allowed him to get out or allowed him to go, and they accused him again and he got out of the city. It was a matter of common notoriety that he was raising forces outside of Bolivar. Juan Siegert was president of the State of Bolivar prior to August 13th, 1892. There are three different families of Siegert in Bolivar. The jefe civil at the time was, I think, a man by the name of Alfredo Alcala. They change them about every week or two. The jefe civil corresponds most closely to our mayor. Gen. Santos Carrera was the military delegate that was sent by the general government to Bolivar to take charge of that section of

67 Guiana in the Yuruari district. He was in Bolivar in the early part of August, 1892. I remember his going out with troops against Hernandez. It might have been the 7th, 8th or 9th of August. Word came that there had been a conflict between them. Mrs. Underhill and I were in Bolivar at that time. By "conflict" I mean battle. I think the battle took place on the 10th of August. It was called the battle of Buena Vista (Good View). That was only seven or eight miles from Bolivar. They were coming and going. Word first came to Bolivar of the battle on the night of the 10th of August. Crespo had not reached Caracas at that time. It was impossible for us to know anything there because the telegraph wires had been cut since June by the rebels.

Q. Will you relate what happened with regard to the affair when you were asked by the government to repair the steamer Nutrias. When was that?

A. They had asked me before to repair another one, and I refused.

By Mr. COUDERT: You were asked when it was?

A. The Nurtrias or the Apure?

By Mr. CLARK: The government had asked you to repair the Apure before this?

A. Before this; yes, sir.

By Mr. COUDERT: When was that?

A. That was in June. They wanted me to repair the Apure.

Mr. COUDERT: Then I object.

Mr. CLARK: This is with reference to proving the fact that Mr. Underhill maintained his neutrality in all respects.

Mr. COUDERT: I object to anything that passed between him and the so-called regular government in June.

The COURT: I don't see the materiality of that.

This line of examination was excluded by the court.

The witness continues: My wife and I had talked since January, 1891, with respect to a plan to go to Trinidad and live,
68 and we had had correspondence in regard to it. We had been down and examined one or two houses and had chosen one, but we didn't make any contract until the month of February, 1892. My wife and I went down to Trinidad then. We settled on the house, hired it, paid rent and got the receipts for it. We went there on the steamer El Callao, I think, March 21 and 22—Mrs. Underhill and I. I came back on the first steamer, I think. I was there three or four days. I took furniture and servants with me to Trinidad. We had three down there and I took one with me, and took down packages of furniture that we required. Mrs. Underhill stayed there at that time and I came back.

My purpose in coming back was because I had to be in Bolivar at the beginning of every quarter, because I made out my water receipts. Thas was the reason for coming back. The river was rising at that time. It rose that summer to an unprecedented height. So high as was never known before. In 1890 we had a very high inundation but this was about four feet higher. It was three or four feet higher than it ever had been before. The effect on the water works in 1892 was as follows: One of the boilers, the horizontal tubular boiler, was entirely covered with water half way up to the steam drum. That was the 40-horse boiler—about 40 inches in diameter—and I could just about reach to the top of it from the pump-house lock. It stopped all the pumping at the water works most assuredly. In 1892 the water was half way up to the upright tubular boiler. I stopped pumping in 1892 on July 14. It was not possible to do any more work with the pumping from that time until I left Bolivar. In order to run that length of time I had to build a brick-work 3 feet high and also the foundation of the boilers, and when the water reached that level it was

even with grate bars and I could not do any more. That was July 14, 1892. After that it went about 4 feet higher and went into the stores. There were not two blocks on that river but what was inundated. My wife was in Bolivar August 11, 1892. Her passage had been engaged on the El Callao. I think the El Callao
69 was going the Sunday following, but she was not unloaded. The 11th of August was probably Tuesday. I did not know anything about the victory of Hernandez before the 11th of August.

Q. What happened on the morning of the 11th with you in regard to the El Callao?

A. We got up very early that morning. It seemed to be very quiet in the city, and we always had been in the habit of hearing——

Mr. COUDERT: No matter about your habits.

Q. State what you noticed?

A. I will be better satisfied. Capt. Wetherell sent up to the house——

Objected to as to what passed between the witness and Capt. Wetherell.

Ans. (continued). —and told us to come on board the steamer.

Mr. COUDERT: All the charges made against General Hernandez relate to conduct on his part, real or alleged, that commenced on the 13th day of August. Anything that occurred on that day or after that day with which he was connected is of course admissible. There is no pretense that General Hernandez was in control of the city until the 13th, and for that reason that date was taken, and in the complaint it is stated on the 13th day of August he imprisoned the plaintiff in his own house.

The COURT: Why do you give it the 11th and allege the 13th?

Mr. CLARK: We shall offer evidence to connect the occurrences of the 11th, the mob and so on, with Hernandez and I am leading up to that

The COURT: Your complaint is that the defendant imprisoned the plaintiff from the 13th of August forward.

Mr. CLARK: And assaulted and beat him. Does your honor think every action in the testimony must be between those two days—every act of assault and battery and every act of false imprisonment.

Q. What occurred on the 11th of August with reference to the mob?

70 Objected to.

The COURT: I am inclined to exclude that because you do not ask anything about the defendant, and it was two days before.

Q. Do you know where Hernandez was at that time, on the 11th of August?

A. I wasn't there, but it was definitely known he was about seven

or eight miles from the city of Bolivar. But his men were going in and out constantly; his couriers were going back and forth even on the morning of the 10th.

Q. Was there anything to connect Hernandez with the mob on the 11th?

Objected to as calling for a conclusion of law.

Mr. COUDERT: Don't answer.

A. Yes, sir.

By Mr. COUDERT:

Q. Didn't you understand me to say not to answer?

A. I beg your pardon. I wasn't looking at you; I was only paying attention to Mr. Clark.

By Mr. CLARK:

Q. State the facts with regard to the mob and all the facts that you know connecting Hernandez with it?

The same objection; also as being irrelevant and immaterial, and contrary to the statements in the complaint, and as not connected with the defendant in any way.

The COURT: He may answer first as to the part that connects the defendant with it and leave out the part that does not.

Q. State the facts with regard to the defendant's connection with the mob of the 11th?

Objected to on the grounds already stated—that the charge is not of any assault or any wrong done by General Hernandez prior to the 13th of August; that it is admitted that he only entered the city on the 13th of August, that is two days after this alleged
71 assault by the mob, and that no foundation is laid for this question.

The COURT: We will confine it to the 13th and after.

Mr. COUDERT: To that I make no objection.

Mr. CLARK: We except. Do I understand your honor to rule out all testimony with reference to what happened on the 11th or 12th?

The COURT: Until we see it has some connection with what happened the 13th and after.

Mr. CLARK: We except.

The witness continues: The defendant came into Bolivar on the 13th of August; I saw him; I saw him coming at the head of the army—what there was left of Carrera's army—a few stragglers and these Italians and Corsicans that belonged to his party before. They seemed to have on new clothes, with bands on their hats, new hats with bands on them, with the words "El legalista" printed on; white muslin bands with "Vive Hernandez" and "El legalista," "Down with the government," all such things. "El legislata" means "We are the law" and "Hurrah for the law," "We are the

law," and "Down with the government." I saw this myself. Hernandez was at the head of the forces; every one was taking off their hats to him. He was the great mogul at that time. He wore rags a few days before that. On Sunday, the 14th of August, the defendant sent about six or eight gentleman there to my house, demanding me to come to his office, to his commandancia, as they call it, to go with him and examine the steamer Socorro, which the government people had disabled, I suppose, before they cleared out; the same as these people had humbugged the Nutrias and Apure for the government, you see, the same kind of treatment. The government people had gone and left the town. Fifty or sixty of them escaped on the British steamer El Callao. When the committee came to my house I was rather surprised to think they were coming for me to go and look at the Socorro after blaming
72 me and keeping me in jail for fixing the other. I agreed to go with them, and I went. I stopped at the place and saw the defendant, and went with him down on board the steamer, together with all these gentlemen. I knew the bigger part of them. Something was said between myself and the defendant of my desire to leave the town. I told him the condition, that my wife had been here so long and the house was entirely in the hands of servants—the house in Trinidad; that she had come up here to see me (hadn't had any letters or communications), and I would like to go on the first steamer to Trinidad. He said, "That is the question now, the fixing of this vessel. The question is the repairing the Socorro." He said I couldn't go away now; I must come on board the boat. So I went on board the boat with him, and after examining the engines I found—the boat, by the way, lay about 150 feet in front of the hotel I had been arrested and put into, and that day they took me on board to fix it. I found they had taken away the valve motion of both engines, horizontal; they had taken away the links, sliding block and all those different parts, and I suppose thrown them overboard, and I saw it was a question of a week or ten days to do the work, because you couldn't get—drawings had got to be made, and I told him I couldn't fix it. Of course they said, "You are going to fix it because you fixed the other one and helped disable this, I suppose; can't you fix it with hard-wood, and so forth?" And I told him no; no hard-wood could make this stand. He understood the hard-wood was very strong, and I could fix it if I wanted to fix it. I told him it was out of the question; it couldn't be fixed except with iron and steel, and even then I hadn't a foundry where I could make castings and the brasses, and it was a question of a week or two. He said, "Will you fix it for us?" Of course they were all around there, hundreds of them, watching me; went down with an armed guard; so I told him yes, sir, I would agree to fix it on the same condition I did for the government people. "Let the board of directors give me a written order and I
73 will agree to fix it, and I will fix this for a thousand p sos apiece as I did the other job." They agreed to it and I went home, and they promised to send me the order, instructions from this company. I went home, and that Sunday I laid it down full

size on my cement floor. Then I took it off, traced it off on brown paper in pencil, marking each one, &c., and gave them to Mr. Manuel Grillet to take them to him, and General Hernandez accepted them, and nothing more was said about it. The next day the Nutrias that I had fixed and that had gone off with different troops came back, and those pieces were found on board. Of course the nigger engineers had no other place to go to, and they all came home like rats, and we found the pieces that belonged to the Socorro, and that ended my connection with that steamer.

Q. Now, on Monday, the 15th, was there anything happened?

A. That is the next day.

Q. With reference to your finding soldiers around your house?

A. Yes, sir.

During this time we could't get any grass for our animals, nor any firewood. It had been a very difficult matter to get that during the time the government was there, but still I got it by paying about four times as much as it was worth. But this morning I went out of the back gate looking for some grassman I might hail to get grass, or woodman with a donkey-load of wood, so many sticks for five cents. I saw a lot of fellows lying around the gate with muskets, soldiers with blankets strung across them, and some had old muskets and rifles and sabers. I knew two or three of them. They had been with the government before. Everybody had bands on their hats, "El legalista." That meant, "The law here, the law here." "El legalista" meant "The law," as near as I understand. These men were soldiers of Hernandez. As I was going to the corner to hail a man—that was only a short distance, as far as from this window to the corner, out of my back gate—they ran after me and called to me, and told me I couldn't go any further. I asked the reason
74 why. They said it was the order of the muncho. They meant General Hernandez. It was a nickname he went by there. I think they had some reason to call him that, because he was maimed in some way; lost his hands or fingers, perhaps, in battle before this. Probably his right hand had been shot off, or perhaps caught in a sausage machine; I don't know. I didn't hear it had been lost in battle. I don't know why it was lost. I don't know that it is lost. With regard to these soldiers this morning at the gate, they told me it was General Hernandez's orders that I couldn't go out, but the servants could, and they pushed me back. Of course, two or three of them I had known in the old government as government soldiers. They turn from one to the other, just according to who is general; and I went back in the gate, and I knew from that time I was a prisoner in my own house. After that there were soldiers kept around the house day and night. They were constantly going and coming all the time, around and at my doors, and sitting on the steps and under my windows. General Hernandez passed there himself pretty much every day. He went out on horseback to the cuartel, some distance from there. After that time, from August 15th until October 18th, two months later, I left that house only two or three times. I didn't go out during that time more than that, because I knew I was a prisoner, not only from

hearsay; every one told me that, you know. Also he had made demands on me for different things during that time. He demanded my house for the Winchestermen, what he called the Sacred Order of Winchestermen. Nothing was said as to what I should do when I left my house. I suppose I could go hire one. Nothing was ever said; and he demanded of me to fix his rifles, Winchesters; and he demanded my animal and cart about the 16th of that same month. Demanded my cart and mule to carry ammunition or something up from the boat. I refused the animal, because I hadn't been using it myself. She had been sick for two or three months. The first time I left the house after the 15th of August was, I think, about the 11th or 12th of September. The occasion was to go
75 to his place and ask him for leave to go. I had sent for the passport to leave on every steamer. Two or three had been there, constantly had been there. Half a dozen had been there to see him. He had refused me. I went myself. I did not know what it meant. I was going to fall down with all this worriment. I was feeling miserable and I went there about the 11th or 12th of September to his house to ask him to allow me to go on the first steamer. After keeping me waiting for three-quarters of an hour, he came out and I explained my business to him and he told me I couldn't leave; that I was in Venezuela now, and I was the servant of the people and he expected in a few days the water would be down sufficiently for me to commence pumping, and he wanted water for the troops. This was either the 11th or 12th of September, I don't know exactly. I do not confine myself exactly to the day, but I know of the mob and certain other dates that are imbedded in my memory. With respect to the guards around my house, I was followed down to the commandancia and they followed me back and asked where I was going when I came out of the door. I told them I was going to see the General. With respect to the cannon, it was about the 27th—26th or 27th of September—they placed the only cannon that they had at that time, which was a brass howitzer, probably about 5-inch bore—I mean it was August 27th. About two weeks after I was first confined, we heard them thump, thump, going through their maneuver, and peeked out. Didn't know what to make of it. We knew the noise, because on feast days they generally had it out on the square getting ready to fire blank cartridges. When we found out they were loading this cannon (which we could see distinctly under our shutters, not any farther than from here to where you are), of course we rushed out of that place immediately. We didn't know but what they were going to fire it off. The cannon remained there with three others until the day I left. The first cannon was pointed at our door.
The others pointed between the doors and windows and all
76 pointed in that direction—pointing right towards the house. The cannons were brought there by the different boats that came in. They had only one in the beginning. That belonged to the old government and was made here in New York. I was taken sick during this period—I guess as near to brain fever as anything else. I was sick in bed. I was taken sick after the 15th—after

going to him and asking him to go away from there in September. I was taken down sick then and had to get up to write him a letter. He wrote me on the 23d of September, demanding me to run the water works in eight days. He gave me eight days to do it in. I was sick in bed from the 16th of that month, I think. I remained sick in bed, I guess three weeks more or less. I have been told that I was out of my head some of the time. My head seemed to be about four times as big as it is now. When I was confined in this house, I felt that my life was in danger. One of the defendant's own generals came to me and told me that my life was in danger, not to go near the windows and doors. One of his own men. There was firing of musketry towards the house all the while. I could hear them. You know what the sound of a rifle going off is and the hitting of a bullet against walls. They all sat right opposite my house, opposite my stoops and they were shouting at the flag and said all manner of things against me, called me all sorts of names, as Yankee, and so forth. After that I saw the defendant himself with reference to letting me go. It was on the same steamer that came into port and brought us up letters. It was in September, just before I was taken sick. I saw him again after my sickness. I asked him to go, certainly. He said he couldn't leave the country. He wanted me to leave somebody there, to go to the merchants and get a bond from some responsible merchant that I would return again to the city and run the water works. I said, "I can't go and ask such a foolish thing, that won't do any good. My stock amounts to ten thousand dollars, I will relieve you;" and I offered this Harold, whom I had educated, to run it. I told him I had no intention of giving up the business, most as-
77 suredly, although I had been negotiating with the government before this revolution to sell to them, as they were going to make it a present to the city of Bolivar, the general government. The defendant refused this young man. He said he didn't want no boys. I said, The man is twenty-one or twenty-two years old; he is able to do it; I am only necessary to make out my water receipts and make my collections; that is the only difficult matter I have ever found to run the water works, to collect the rents. He said I couldn't go. I was the servant of the people and was in Venezuela now, and he wanted me to stay there, but if I would fix the steamer—that was another steamer, that I would prove I was with them. Mrs. Underhill was with me up to some time in October. I think she finally got permission to go away on a steamboat running from there the 2d or 3d of October, but she wasn't allowed to leave, either, up to that time. The excuse was, ladies couldn't go, &c., but other people went. Mrs. Underhill had hardly got out of sight before they commenced to come there, making demands on me with reference to the water works. The defendant had written me a letter on the 23d of September—General Hernandez—and I was sick at the time and got up out of my sick-bed to answer him. He had written me a letter. I have the letter. Mr. Clark has it. I answered it the next day. With reference to the water works, in order to state what happened I have got to tell what he wanted me

to do. He gave me eight days to clean it up, &c., and go to work pumping. The letter now shown me is the letter I refer to.

Counsel for the defendant, Mr. Coudert, offers the letter in evidence. It is marked Defendant's Exhibit A, March 27, 1894.

78 The letter translated into English reads as follows:

UNITED STATES OF VENEZUELA,
State of Bolivar.

No. 278. 29° y 34°

CIUDAD BOLIVAR, 23*d Sept.*, 1892.

Citizen George F. Underhill, present:

As the cause for having stopped the operation of the aqueduct, in July last no longer exists, I beg to call your serious attention, in your capacity as contractor for this important service, to the performance of the duties for which you contracted with the government and the public. To this end you are notified and allowed eight days, counting from today, to put the machinery in operation. It is understood that the boiler has been dry for more than ten days, during which you had ample time to make the necessary repairs and not deprive the public any longer of such an indispensable element. I submit this for your information and consequent action.

DIOS Y FEDERACION.
(Signed) JOSE MANUEL HERNANDEZ.

The witness continues:

No. 278 is the number of the letter.

It is admitted that the stamp on the letter is the official stamp of the jefe civil.

This stamp reads as follows: "Office of civil and military chief of the Guayana section, Territory of the Delta, river districts north of the Orinoco." This blue stamp on this exhibit was the stamp that they took. Of course it was the same as the government had used on all their papers. Prior to the time Hernandez came in, Carrera had a similar one, you know. I do not know whether it was just the same. He was the military delegate of the government. They did the same thing of course after he cleared out. This state-
79 ment in the letter, "the cause for having stopped the operation of the aqueduct in July last no longer exists," was not true on the 23d of September, 1892. In the first place, there was about 30 inches deposit of mud over the floors and the water was up to the pump-house doorsill and the outside pump was covered with water, and the difference in the level of the pump-house floor and that foundation was about 4 feet 6 inches. I know this of my own knowledge for I went down there.

Q. I thought you were in prison all this time?

A. I was. I was followed with soldiers down there. I went to the defendant's house to ask leave to go. He wouldn't let me go. Supposing that there was no mud at all there. I could have started

up if there hadn't been any obstacle in the way, about the day that Mrs. Underhill left and went on board the ship, because it was reported to me then that the water was half way down on the outside pump, but the mud was still there. About 30 inches of mud. To have cleared up these works from the mud and the other damage there so that pumping could be resumed, it would have taken probably about two months or two months and a half, but had the river been falling and cleaning at the same time, I could have done it quicker because it would have gone with it as it went down the current. But after being left there—and all the damage the Nutrias did running into my tanks and all sorts of conditions in thistime—of course it gave me more work to do, besides the pilfering of my valves and everything in the shape of brass they could take. Even if Mr. Hernandez had been in a position to order me to start up the works, eight days would not have been a reasonable time from the 23d of September. It would have been out of the question. I could not have done it in less than two months and it would have taken longer.

Q. Is this statement true in that letter: "It is understood that the boiler has been dry for more than ten days;" that was on September 23d, 1892?

A. Well, one of the boilers.

Q. How about the other?

80 —. Oh, the other one was—you can imagine how dry it was when it was a brick-set boiler.

Q. Was it dry?

A. The iron-work was, but the bricks was pretty well soaked, what was left of them; they had stolen the biggest part of the fire-bricks out of there, skinned it out pretty well. A demand was made upon me from the defendant that I sell the water works. He sent the government lawyer there, Dr. Brigado Natera. First off he sent a man by the name of George Mathison with a letter of Brigado Natera, which you have. He sent this gentleman there with this letter. He spoke good English. The defendant had a conversation with me with reference to these water works. He stated that he wanted me to leave somebody there to run it, if I went away, for one thing. The defendant finally let me go from Bolivar on the 18th day of October. I laid all these facts before the United States consul at Trinidad.

Cross-examination by counsel for defendant:

I believe that those four cannon were put there to threaten me. I was told so. They did it to annoy me, sir. I don't know what to believe with respect to those people at all.

Paper is shown to witness and after examining it, he says:

The house marked in the middle "Underhill," represents my house, I guess. That would compare with my plan. The part marked "I" is a hospital. I built it myself. It was built for a hospital but taken possession of, part of it, all except the chapel. There were some twenty-five or thirty soldiers kept there after Car-

rera got in power, and before Hernandez went there. The cannon were nearer my house than they are on this plan. The men sat on my stoop. I see five cannon in the plan. I only saw four actually. They were pointed there (indicating). They were pointed at a window, pointed there at the corner. The first was put so that there was hardly room to pass. They made them go around the cannon

81 Mr. COUDERT: Mr. Underhill says the cannon were nearer his house than the barracks.

The witness continues:

They were between the barracks and my house. When the defendant took possession, he made barracks there. There were barracks there before. There hadn't always been barracks there since I was there. There have been barracks since this last war, 1891 and 1892. They were merely temporary barracks, you know, "A" was the State college; "B" was the Plaza Bolivar, Bolivar square; "C" was the Government house. I don't know whether "D" was the Winchester barracks. There were just as many Winchester men over here opposite my house. I don't know whether "D" was a military barracks; that is a private house. It is very possible, "E" was an infantry barracks before General Hernandez was there, where the infantry were, and "F" was the Commandancia de Armas. With respect to "G," all those were four private houses. They were used as barracks before the general came in. "I" was the barracks of infantry and artillery which I have already spoken of as being a hospital before it was a barracks. I never saw any cannon there before. The diagram says "artillery." I never saw the cannon in that building. The diagram calls it "cuartel," which means there was infantry and artillery there. I never saw the artillery there. These were there before General Hernandez went there. Before he went there, all these places were full of barracks. It wasn't only after I came there for the purpose of frightening me. I knew these soldiers before. They are like cattle and follow a leader wherever he went—I know they live on a handful of corn. He is a brave man, General Hernandez, I can say that for him—all except these Corsicans and Italians, they were his staunch, true men, who stuck to him in this thing. The house I lived in did not belong to the government. It belonged to the municipalty. It was given to me by the contract. It was mine until the expiration of the contract. I hire a house in Brooklyn now. I do

82 not call it mine because I have a lease but that was mine in the contract until the contract was annulled. They made a deed of it to me—an actual deed of the house until the expiration of the term of the contract. There was nothing but the walls to it and I put the roof to it and floors and windows and doors. This place marked "O" is not where the tanks were. That was a part of the property. It was about 175 feet square. There was a little Trinidad tank there, mounted up as a bath tank, that would hold about 200 gallons. Here is a window and door where I told you these cannon were. To the right of that door about ten feet was

mounted a little tank four feet square. In other words, one of the tanks from Trinidad cut in half to hold sufficient water for baths in my house. All that part marked "tanks," was not devoted to public use at all. The tank in there which was built for the water works was never used at all. Although it was in my contract to build a tank it wasn't used. I built it inside of there. It was built for a tank. That is the one 80 feet in diameter—a great big tank. There was never any water in it except when I pumped it in and after that we never used it two weeks. The part built for tanks was not on the part marked "O." It was over that line about 7 feet. I should call it on the side of my house. As to this part here marked "door," the space there from one road to the other was about 175 feet. There were no doors and windows except on that corner only. My exit and entrance were by an arched door. The windows were along here in front. That (indicating) is the rear opening into the yard. That (indicating) is the gate I went out of when they drove me back and told me I was a prisoner. These 170 feet were without doors and windows except on that corner there was a door and window. The cannon I speak of were directed against that part of the house which had simply one door and one window; right at that corner of the house. The cannon were pointed at the door and window. This was built of stone. The cannon were right up close on that corner. There were no cannon in front of my house.

83 Q. There was a jail in the place, wasn't there, and they never locked you up in that jail—Gen. Hernandez and his people?

A. His people——

Q. I wish you to understand that in all these questions that I ask you I only refer to the 13th of August and the days subsequent to that, from the time that you alleged that you were imprisoned by Gen. Hernandez you never were imprisoned in any place except your house. Is that the fact?

A. I didn't know. They said they had orders of Gen. Hernandez to put me there. That is the reason I went to jail.

Q. I am asking about the 13th and thereafter. You never were imprisoned after that except such imprisonment as consisted in confining you to your own house. Is that true?

A. That is true, but I was threatened.

Witness continues:

Gen. Hernandez and his people were rebels against the then existing government. The regular and legitimate government was the government to which they were opposed. They were considered rebels the same as we consider the rebels in our war. The other people, the Palacio people, were in possession of the government. General Hernandez and his people were violating the law of the government then existing. I knew so at the time. I did not show my sympathies with the Palacio government. Some of my men did and went to the war. My book-keeper did and my collector. I did not send them there. I know it was charged against me that

I had sympathized with the Palacio government. I am quite sure that this was not the general belief in that community. It may be that Hernandez's people believed it. I suppose they must have thought so because I helped in fixing this steamer, the Nutrias.

Q. And you tried to get off on the same boat in which the defeated government officers escaped, didn't you?

A. Well, I wasn't—my intention wasn't of going on her because I hadn't engaged passage on her, but when I got down there and saw that mob I was determined to go if possible.

84 Q. You haven't answered me yet. I will make it more simple. The Callao you have spoken of as being in port, and you have said that the officials escaped, all of them, there was no authority left, was there?

A. Nothing.

So far as I know, not a man—chaos and anarchy. I expected to get redress, if I was wronged, from Hernandez when he came in. He took forcible possession, and when he took possession I went to him and addressed him as the civil and military authority. I had that respect for him and couldn't do otherwise. The Callao was an English ship that came into port and carried off all these defeated men and couldn't do otherwise. They took possession of her. I tried to get away with Mrs. Underhill on the same boat. There were two parties to this revolution—the Palacio people and the Crespo people—as far as I know. I was in the country at that time and had lived there many years, but merely heard that. I paid for the newspapers but did not read them. I didn't say I had seen these things in the newspapers. I didn't know of it until I got to Trinidad. One party was the Palacio party, which I understood represented the law, "legislata," and the other the Crespo party, of which General Hernandez was one, which represented the rebels' party. There was a revolution throughout the country. Crespo was trying to get possession of the country, although I don't know as he was the head. He was one of the heads. There were two or three trying to get there. He was the one that succeeded. I believe the fight was between the government and Crespo, really. Crespo was finally recognized by the United States as representing the authority, in October. The revolution had lasted way back from the summer. I do not know the ground of the revolution and why General Hernandez, Crespo and the rest of them called themselves legalists or representatives of the law. I produced in evidence here the constitution of Venezuela. I have read parts of it, most particularly relating to mining codes, etc. I know that others took the place of General Palacio

85 after he left the country. I heard that his term of office under the constitution expired in February, 1892. I think so. I don't know that Pallacio refused to leave office after his term expired. There was never a president of Venezuela but fought for office after his term expired. I didn't understand that General Palacio's term expired in February under the constitution and that notwithstanding he refused to make way for his successor; I knew he was the existing president and that was the government. I

didn't know that General Palacio's term expired in February, 1892. I heard so, but that was only hearsay. I don't know whether or not congress declared him to be a usurper when he remained in office after his term. We couldn't get any communication there by newspaper. I do not know whether congress did it or not. I do not know whether congress levied war against Pallacio by right of its authority under the constitution only from reports there. I do not know from this constitution that congress had the power to levy that war.

Q. Did you ever read anything about the congress in the constitution?

A. Some. I never was much posted. My business ran in an entirely different direction from that of a lawyer.

Q. No matter about your business. Let me come *come* back to your expression. You talked about rebels and your counsel has talked of adventurers. When you called General Hernandez a rebel did you know that Pallacio's term of office had expired under the constitution, that congress had declared war against him and that all good citizens were called upon to drive him out; did you know that?

A. Yes, but——

Q. You have answered it.

A. I only know that others had been appointed by the government to take his place.

The COURT: Stop right there. You will have an opportunity, and your counsel, to re-examine you on any explanation, so you need not be afraid you will not have a chance to explain, be-
86 cause you will, but just now answer the inquiry and leave it to be explained afterward.

Q. (Question read to the witness.) When you called General Hernandez a rebel did you know that Pallacio's term of office had expired under the constitution, that congress had declared war against him and that all good citizens were called upon to drive him out; did you know that?

A. No.

Q. Do you wish to change that?

A. No, sir; if I am to say yes or no I will stick to that. I said no, and I can explain why I said no if you want an explanation.

Q. I don't want an explanation. You have answered me yes, and after some interruption you answered me no; which is true?

A. In my answer I said "yes," but you see——

Q. You can answer, as the learned judge told you.

A. I didn't mean to say yes, I knew it.

Q. That was the general notoriety, wasn't it?

A. It was. I stated that Crespo and Hernandez with him were the rebels. I would call them rebels as long as they were working against the government and even supposing there was no government, that Pallacio's term had expired, Pallacio left others there to represent him. I do not know anything about the laws where you

come to go into it in Venezuela. I know only what happened in Venezuela for years and years.

Q. As the learned judge warned you often enough to answer I want to come back. You have called this man and others adventurers and rebels; I want to know upon what you founded that, and I ask you again if it be the fact that if you had known that General Palacio's term of office under his oath under the constitution had expired, that congress had called on him to give up his office and he had refused, that congress in pursuance of its authority under the constitution had declared war against him and called upon General Hernandez, Crespo and the rest, to oppose him would you still call them rebels?

A. I wouldn't. But congress didn't call them.

87 Q. Then you know congress didn't; do you mean to say that?

A. I mean to say that Crespo was the man working against the government, and not this man until long, long afterwards. From hearsay, I know that congress called upon Crespo. I didn't believe it. They had no right to do such a thing. I never mixed up with politics. It was impossible to find out. I called him a rebel because he was rebelling against the government. The Pallacio and Polido government and all those governments that held Caracas until he arrived there. They told me that congress was against Pallacio. Congress can put any man there. The president is the head man. I think Polido was the last president. He had charge of everything. I don't know whether he was regularly elected president. I only know from what I see in the papers. I read the papers. I read the Herald when I could see it. I knew nothing about this until I got in Trinidad. When I was down in that place I knew the government had everything and everybody that rebelled against the government was a rebel. General Crespo rebelled against the government. Congress has something to do with it, certainly, but the president has more to do with it. I call persons rebels as long as they rebel against the government that is in power. If congress had levied war against Pallacio, and Crespo was acting according to the laws of congress, I should still call him a rebel. Ciudad Bolivar was not my residence at this time. It was in Trinidad. I think the amount of receipts I got from Trinidad prove that. I resided in Bolivar in 1892. I resided there because I was obliged to. That is the only reason. I made affidavits and had General Hernandez arrested. With respect to this statement in my affidavit "that in the month of August, 1892, and for several years prior thereto the plaintiff resided with his family at Ciudad Bolivar, in the Republic of Venezuela, South America; that he was engaged in business there" I would say, I lived there all along up to the time I hired this house in Trinidad in February, 1892. In August, 1892, and for several years

88 prior thereto I had that house there at Ciudad Bolivar. Can't a man go and come? You can have a summer-house. This affidavit was made in November, 1893. I was obliged to be there on and off to look after the business. I resided there not

altogether with my family. I don't think it is mentioned in that affidavit that I resided in Trinidad. Ciudad Bolivar is the place where this assault occurred. I did not consider that I resided there because it was more convenient. I had both residences. I had two residences with my family. I had taken that place down in Trinidad. I am not allowed, I believe, to say anything more than yes or no. I can explain why I took that residence in Trinidad. In August, 1892, I was obliged to reside at Ciudad Bolivar. I was engaged in business there until I got so far advanced in that business I could leave it in charge of some one else.

Q. Let us come to the 13th day of August. As I understood you, prior to the entrance of General Hernandez into that city there was anarchy there, no governing power, no judge, no laws, no prefect, nobody to insure order?

A. Yes, there was.

Q. You told me there was not.

A. How could I be arrested then under a printed document of the government, which they used from the prefects?

Q. The only proof that there was a legal government is that you were arrested, is that what you mean?

A. I have got the printed papers that they used there, where they use the prefect's stamp and everything—that is all I know and his own name was among the parties.

Q. Try to recall what you said a moment ago. I used those very words—I asked you whether when all these men left, who left on the El Callao, intermediate that time and the arrival of General Hernandez, it wasn't a fact that all the civil and military authorities had gone and there was chaos and anarchy in the city, and I understood you to say, yes, it was so. Do you wish to correct it?

A. They immediately took possession and let the prisoners out of jail.

89 Q. Am I right in reciting your testimony in that way?

A. For that moment.

Q. How long did that moment last?

A. That moment lasted until the time I was mobbed—to between seven and eight o'clock on the 11th of August, in the morning.

Witness continues:

On the 11th of August there was a government of some kind there, because I was served with these papers on that day. As to the 10th of August, I didn't know because that happened in the night-time. I don't think there was any government that night; that night or perhaps early in the morning of the 11th of August. There was a time when they were all gone, intervening between the time these people had escaped on board the steamer until the time I was about to embark, between seven and eight o'clock in the morning; and I was alone. They had already got on board the boat during the night and early in the morning. That is the time they took possession. There were authorities between the time when the regular authorities escaped and the 13th of August when General Hernandez came in. They called themselves the provis-

ional government; made up of his officers, men who were in the field with him. I think there might have been half an hour or so—it might have been less time—between the taking possession by General Hernandez of his officers and the running away of these other officials, when there was no one there to protect order. When General Hernandez came in, he assumed command. He assumed all government authority therein. As far as I know, he was the only constituted authority in the place and he was not constituted. General Hernandez never personally struck me. I couldn't say he always treated me with courtesy. He never came to blows with me. He never touched me—only his men did, that is all. They handled me pretty roughly. I do not believe he instructed his men to strike me. I do not truly think he instructed his
90 men to do that. After my arrest, the only imprisonment I suffered was in my own house. Referring to this letter of September 23, 1892, written by General Jose Manuel Hernandez to me, I answered it in writing. Referring to this letter, I understood that he supposed that the waters had begun to fall so that the aqueduct could work. He gave me eight days. He understood that the boiler had been dry for more than ten days. He gave me eight days. There were two boilers. The inside of one might have been dry but it was covered with felt on the outside and that was certainly damp. If his supposition had been right, a week or ten days would not have been ample time to proceed with the work, leaving out of question the mud. I could have commenced operations on the 2d of October. This was nine or ten days from the 23rd of September. It is not true that he was not wrong by about two days. I could have commenced to take out the mud and clean it up, but it would be a question of about two months. I didn't commence, I didn't notify him that I wouldn't commence at any time, not exactly in those words. The answer is in writing. I didn't tell him verbally I wouldn't commence at all. I told him verbally I would leave people there to clean it up. I did not tell him verbally I wouldn't commence. I was willing to do it.

Q. You were willing to do it through other people?

A. Did you expect me to go there and shovel the dirt and clean the place up myself?

The letter now shown me is the letter I handed to General Hernandez in answer to his demand. There were no other water works in the city. These were the only ones. If those were cut off and stopped, the people would have to resort to the old style of getting water by tanks.

The letter is offered in evidence by defendant's counsel and is marked Exhibit C.

This letter reads as follows:

91 "CD. BOLIVAR, *Sept. 24th*, 1893.

Senor Jose Manuel Hernandez, civil and military chief.

DEAR SIR: I have the honor to acknowledge the receipt of your official note, No. 278, dated 23rd inst., in which you are pleased to

inform me of the importance of putting the aqueduct in order (the inundation having passed) and to continue the supply of water to this city according to contract with the government. You further allow me eight days in which to complete the repairs, and commence operations of pumping. In reply I have the honor to say during the number of years I have directed the enterprise of the aqueduct of this city, I have managed and extended it through the greatest amount of difficulties, and without any financial success to myself. The government never fulfilled one article of their part of the contract. Yet they were always promising to improve the Reglamento and to protect me in the way of non-paying subscribers, &c., &c. But the officials, or community, at that time never insulted me, or threatened to take my life, and my patient endurance and hopefulness have buoyed me on to the present year. On the 14th of July, when I was obliged to cease pumping, it was my intention to start up again as soon as the works had become dry. But since the occurrence of the 11th day of August, and the insults I have received, and your refusal to give me a passport on any steamer that has sailed from this port during this term of six weeks, I have come to the following decisive conclusion pertaining to the aqueduct: I shall never run the aqueduct for the city of Bolivar again.

I left the works in perfect order on the 14th day of July, and so they can be found today, unless made otherwise by malicious hands If it is your right to take possession of that business, you must know, and can act accordingly. All buildings outside of the
92 pump-house is my private property. My stock and tools contained in the office building is also my private property.

I have the honor to be, very respectfully yours,

GEO. F. UNDERHILL."

This letter is to the defendant, the rebel.

Q. Were the statements as to your reason for not going on true, in here?

A. Not going on, true? But we had had conversations——

Q. Were these statements true?

A. I never intended to run it again.

Q. And you gave him notice emphatically you never would run it again?

A. I calculated this wasn't the government; my contract was with the government.

Q. In this answer to General Hernandez you profess to give reasons for which you declare your determination never to run the aqueduct again; were those reasons true?

A. I didn't expect, the condition I felt in, I would ever be able to do much again.

Q. You haven't answered that. I haven't asked *asked* about your health.

A. That is the truth. I couldn't do any more. I was going to put others there to do it. I done it for ten years.

I went to his office to tell him. I got up from a sick bed to answer that. Even then, they misconstrued it and held me there

to a court-martial for writing that letter and saying I was insulted. The reasons I gave for expressing the determination not to run the water works again were true. I had been insulted. I didn't say to him that he didn't give me enough time. What right had I to expect this man when the government was in power—what right had he to demand it of me? He was in power, in forcible possession. I addressed him as "chief and military authority" because his letter came there so stamped. I didn't give him the reason I have just given to the jury as to never running the aqueduct again because I didn't consider it any of his business. I supposed that would be enough at that time. I had had a talk with him about it before. I do mean it wasn't his business. I think that
93 man had no right to write me a letter making demands on me. I didn't dare tell him it was none of his business. I knew that would mean the jail in 20 minutes afterwards. I didn't intend to run the water works again. I meant I never would run the water works again. I didn't tell him any more on paper I was going to run it. I told him I wouldn't run it. I didn't give him the reasons that I gave a moment ago to the jury because I feared him. Those were not better reasons than this. I had asked him for six weeks for leave to go away and five or six different ones had asked him and he insulted me when I went there and told me I was—all sorts of names. He told everybody he was going to break the contract with me. That is not the reason I wrote him this way. I didn't mean to run it again. I didn't tell him that I wouldn't run it because it would take two months to do it and that he hadn't allowed me time to do it because I had already told him about the Nutrias running into my building and smashing all things out of shape. He wasn't willing to pay me one cent for it. We talked about fixing up the water works before this letter was written. I talked about being insulted before. I don't know why I told him one thing I talked about and not the other. I couldn't put too much on paper. I didn't mean to run it. By "grand mogul," I mean the defendant was looked up to by the people as being their savior, as the only one man in town in power. Crespo at the time wasn't thought of. It was in everybody's mouth, "Vive Hernandez," and placards all over the streets describing him as the great benefactor and savior, and all that sort of thing. I merely made that remark the same as we say it here. He was the only one to be looked at. The feeling of the people seemed to be that his fame was so great as to even overshadow Crespo's. I had heard of Crespo. I knew that Crespo was one of the heads of the revolution. He was one and his brother and several others. He was the head of the revolution. Those who served the revolution called themselves the law, I believe. They called themselves the law-abiding
94 people, and those people who called themselves by that name were the followers of Crespo as distinguished from those who followed Pallacio. This revolution had been going on all over Venezuela before that. When congress tried to get together and appoint—but congress never could get together to decide on anything for the presidency, and part of them split up and made the

revolution and got Crespo to try to overthrow the government. That is about it. I know they were trying to get the congressmen and senators together and to form another government and to have a new president. I don't know whether Pallacio, the president, was out of office by virtue of his term having expired, only from hearsay. I heard they were trying to convene, to get together the different congressmen to elect a new president. A great many were for electing Pallacio, others for ——. I only know the cause of the revolution from hearsay. There were half a dozen candidates for office. I know Congress never got together. There wasn't enough of them there half the time. They were always fighting. There were three different factions: the Gordos and the Crespo party and the Pallacio party. That was for the election. They couldn't elect anybody. They couldn't agree. I am not sure whether Pallacio's term had expired. I think it was on the verge of expiring and before this they were trying to meet, congress was. Pallacio had been president about two years. In that country they claim to have the same laws we have. They don't go by ballot. The president, whoever it may be, is president from such and such date, and the prefect. I supposed the presidential term was two years, but there has never been a president served less than four, six or eight years. I don't know that by the terms of the constitution no president could serve more *more* than two years. I never knew that. This subject has never been brought before me before. I never had occasion to look into it. That is an affair of ministers. I have been a consul there, that is, in that country. I didn't hear that congress and the courts had proclaimed Pallacio a traitor. I didn't hear that congress had decreed him a traitor nor that
95 the courts had. They couldn't get congress together, couldn't get enough men together and half of them were niggers. I know congress didn't proclaim him a traitor.

Q. If I show you that they did proclaim him a traitor, then you will say that you were mistaken, will you not?

A. You can only show it to me from the paper reports, that is all.

I am not a Spanish scholar. I managed to make my deals with them. The paper shown me, purporting to be a proclamation of congress, was in March, 1892. I have never, never seen such a paper before, although I know of several men here who are friends of mine who were government people. I never saw this paper before. I never heard of this proclamation. I must explain one thing. Of course it may not benefit me in doing so, but you know that any government in power print their own newspapers. There is no other paper allowed to be printed. They are put in jail the same as this man did when he came in power. He did the same thing. This is not a newspaper, but it is printed by the department of public works, no doubt. I don't know it, but if it is printed in Trinidad it would be in English and this is Spanish. They do print papers in English in Trinidad. This paper shown me is not the official Gazette published in Caracas. I never saw it before or heard of it. I never was much posted on the diplomatic affairs of

the country. I know very little about the geography of the country. I know something about the district of Guayana by being there.

Q. That was a large district occupied by Hernandez around Bolivar, wasn't it?

A. After you left Bolivar you couldn't find a house for several miles—nothing but mines—and they were fifty miles apart, and then they were mud houses.

I know General Carrera of the government had authority there. The government was driven out from Bolivar. Carrera was in Bolivar. He didn't run away, he was killed, and if his people had not run away they would be in Caracas today. Carrera was
96 killed and the others took refuge—General Hernandez, after these people were killed and dispersed, was the only authority in Bolivar. He took possession, forcible possession, of course. In Guayana, through those forty or fifty miles, where there were no houses, there was other authority there. In the mining districts, the government people had not escaped out of this part. That was the only part of the country he had taken. The only part of Venezuela that the rebels had taken possession of—that was the only section. There certainly was other authority, civil or military, within fifty miles of Bolivar besides General Hernandez. The government was in possession all over except Bolivar. He had beaten them at Buena Vista, about seven English miles from the city. They were in the city at the time. The prefect ran away. His jurisdiction extended over the city and the limits, of course. The limits were just outside the city limits, maybe three or four miles. The custom-house had run away. I suppose the judges had all taken flight; great many of them turned over. I do not know the names of persons who resisted Hernandez's power within thirty miles of Ciudad Bolivar after the battle of Buenta Vista, but I know there were government officials all over the country, not in the city. I do not know that Hernandez's army had overrun all that country, and had beaten the enemy at Buena Vista and was master of it. The government had beaten him, and when they crossed the river if they let matters rest right there—Carrera and two or three others got over there and were killed. At Buena Vista he did beat. That was not the only army the government had in that section of the country. Oh, no. The other army was across the river—probably a mile or so after crossing the river in Guayana. I don't know who commanded that army. They weren't on this side at all. That was over in the State of Bermudez. It is only an hour's sail across the river. Although it is only five minutes between Brooklyn and New York, you call it New York all the same. The battle of Buena Vista didn't drive out all
97 the officials of Guayana, only in Bolivar. I don't know the names of all the government officials who were left. I know I heard there were officials who were left. I know some got on board the boat on the 18th of October when I came down there. After the battle of Buena Vista, when this general who commanded Pallacio's forces was killed, there were some that were caught there that tried to resist, and he put them in jail. Guayana was the only

place in Venezuela where there was an organized force to resist General Hernandez openly, from the time of the battle of Buena Vista to the recognition by foreign governments of Crespo on the 16th of October, 1892.

General Hernandez did not refuse to give me a passport on account of my conduct, in some way or other with the aqueduct. He did refuse to give me a passport because of my connection with the aqueduct. The first time he refused to give me a passport in connection with the aqueduct was about the 14th or 15th of September. He wanted me to get bonds from some of the merchants that I would come back again on the next steamer. He said he heard that I was going to leave the country and abandon the works—abandon all my property there. He said if I would get one of the merchants to give a bond that I would return on the next steamer, he would let me go. I told him it was ridiculous for me to ask a merchant that when I had ten thousand dollars of stock in the place besides what the buildings had cost me. I certainly told him I did mean to come back, I would come back. This letter you show me was on the 23rd of September. His letter to me after that was the 23rd of September. I asked him in that interview if he would pay me for the reparation of damages that the Nutrias had caused by running into my building. That interview took place about the 14th of September. There was a steamer in and I wanted to leave. I went to him for a passport after he had refused others to let me have one. He told me he would not give me a passport unless I promised to come back and give bail to that effect. I told
him I could not ask merchants such a foolish thing but I
98 agreed to leave my man there, which he thought was a boy
and wasn't fit, although he had been running the business for two years. He said I was a servant of the people and had no business to leave and that he was going to hold me there and no American gunboat could take me away unless I gave bail. If I had given this bail to come back, he might have given me a passport, but I don't think he had a right to ask me that. Crespo hadn't reached Caracas yet and the government was surrounding the whole country, why should he have the audacity to ask me that? That was either the 14th or 15th. It might have been the 14th; I wouldn't swear, but I know there was a steamer in port and I had sent the doctor there and Mr. Gillet and three or four more. This was the first time the question of the aqueduct ever came up, but he kept me there six weeks previous to this. When this thing came before me again, my blood boils to think how I was outraged there, and I can't help but say something if I lose the case. That ends it. On some day, the 14th, 13th, or 15th, I had this conversation with General Hernandez in which I stated I would come back if he would let me go. I wanted to leave this man to clean up, you know—23 years old. I meant in good faith to return, most assuredly. When I came home on the 14th of September, I gave up all hopes of going, and then I was a sick man from that time. I wasn't feeling very well before. I thought there was sickness

coming on me and I must either get out or go mad. There wasn't hardly a day but they were demanding something.

Q. On the 14th day you told him you would come back and run the aqueduct and on the 24th you told him in consequence of the insults you had received on the 11th you never would run the aqueduct for the city of Boliver again. Is that true?

A. Please read that letter; I referred to other things besides that in the letter.

Q. I would read it with pleasure if the jury would like to hear it; it is one of the nicest pieces of literature in the case, but I can't take the time of the court. I simply want to know if any
99 event had occurred between the 14th and *14*th which made you change your mind; that is, on the 24th you were willing and anxious to run it and on the 24th you declare in consequence of the insults you had received you never would run it again. Now I want to know what event had occurred in the meanwhile, if any, or if you had simply changed your mind?

A. I fell sick then, right off sick in bed; and every time they passed my house they were howling and yelling and abusing us in every manner; and this gentleman, who had been a friend of ours, even told us he told him not to come to the house, and so forth; and we couldn't get anything; we had to kill goats to live on.

I couldn't get away. I was taken down sick. That is the only explanation that I have to give for the difference in my promise in the one case and my threats in the other. I was thoroughly disgusted with the actions up to that date. He kept me there six weeks a prisoner and did not allow any of us to go. I believe he made some such remark for not allowing Mrs. Underhill to go to the effect that it wasn't safe to go alone, but he allowed other ladies to go. He would not allow me to go with her, or my boys or my servant or any one. So far as I know, he said it wasn't safe for ladies to go alone.

I said yesterday that after I had written that letter I was court-martialed. He came there to the house, the people came there and his judge came there. I don't remember using that word exactly that I was court-martialed. It might have been that I said "after I had written that letter I was submitted to a court-martial." It was in this way: I suppose that the men sent to my house on September 13th was a court-martial for the insult in that letter as he claimed. He charged me that I insulted him in my answer to his letter of the 23d of August. I was not called before any court. There was not any assemblage of men in uniform. I was sick in my bed when they came. I got up to sign some paper. They didn't take me out of my house. I saw officers who consti-
100 tuted a court-martial—a judge there. I didn't see any military officers; they were just dressed in uniform there. I understand that in this country a court-martial is a court composed of military officers. A court-martial is not the same down there. By a court-martial I didn't mean a court of soldiers. I meant the court, the justice there, not a court of soldiers, although I was surrounded by soldiers all this time. The reason why I said court-

martialed was because afterwards he published it in the newspapers which we afterwards had translated, and said I was court-martialed. I called it a court-martial, but they were judges of the court whom he had named—never were judges before. Judges of a civil court, which he named. As to my having been tried, he claims that I was. They wanted me to sign a paper to exonerate him for any blame for what happened on the 11th of August, and I said yes. I was not tried before a jury. They merely took my statement. I suppose I gave evidence. They were determined to get in, and I had to let them in. It is not the truth that as soon as I wrote to General Hernandez, that I had been insulted and abused, as stated in the letter, he immediately ordered an investigation to find out who the guilty parties were.

The minister of the United States there at that time was Scruggs. Mr. Partridge took Mr. Scruggs' place. He was glad to get out of Caracas. Looking at the paper now shown me, I see the name Frank C. Partridge. I see the seal.

Q. Will you look at that and see whether that is the record of the case to which you allude, which you first called a court-martial, and which you next say was a proceeding in which you were examined as a witness?

A. It is in English?

Q. No, it is in Spanish. I have an English translation.

A. I would like to see the English translation.

Q. Will you look at that and see if that is the certified one? This is merely a translation which your counsel might object to.

A. This man Partridge was not minister at that time.

101 Mr. CLARK: Objected to. You cannot prove the paper that way.

Mr. COUDERT: I have not offered it in evidence yet.

The WITNESS: This is the minister's signature and seal authenticating the signature of this man who was in power in Caracas then, which was the Crespo government.

Q. Do you know Spanish enough to see whether that is a record of the proceeding? You can look at the beginning and the end.

A. This is a question of several hours; but I see here the name of the judge Guillermo Natera and his secretary Luis Alcale Sucre. Those are the names. They came to my house on the 30th—we will see whether it is the 30th of September.

There was no sentence against me that I ever heard of as a result of this. They were trying to get me to exonerate the defendant from the blame. He only states in his Trinidad papers that it was a court-martial. Here it is (pointing to papers), in the criminal court, they call it. I could not go to the court. Therefore, they demanded entrance to my house. They demanded my evidence as a witness.

Q. Did you have any participation whatever in this except as a witness, and, if so, what was it?

A. I knew if I didn't say——

Q. No matter what you know; I am asking you as a fact—did you have any participation whatever in this except as a witness?

A. That is all, but I know the paper I signed did not contain fifteen lines, while they have got a pamphlet.

By the COURT:

Q. What did you say to the question whether you had anything to do about it except as a witness?

A. Only to answer the questions; that was all.

Q. He asks whether you were examined as a witness?

A. I was examined, yes, sir.

Q. Then was this question put to you: "State your name, surname, age, condition, profession, nationality and residence?"

A. Yes, sir.

102 Q. To which you answered, "George F. Underhill, 47 years, married, North American, residence this city, engineer by profession?"

A. Yes, sir; I suppose that is the same.

Q. You swore you were a resident of Ciudad Bolivar?

A. My domicile was in Trinidad.

Q. Yesterday you said and your counsel said, you were a resident of Trinidad. Here you swear you were a resident of Ciudad Bolivar.

A. I believe Webster calls either one a resident or domicile. Domicile is where I have my home for any length of time. Bolivar was always my residence. I have not studied Webster since yesterday. It is in the warehouse—been there for some months. I have not studied Webster since yesterday or any other book. I mean to say I pledge you my word I have not seen any dictionary. I have talked with my wife. I was not instructed by counsel to make a distinction between domicile and residence. We talked this matter up coming down in the car. We could have one residence or two residences or three residences. Yes, this was today. Not with my counsel, with my wife. You have asked me that question three or four times. I have told you no. My word is as good as any man's in this room. I have spoken to no one. I will leave it to my counsel. Their word, I presume, you can take. I was asked at that time whether I had written that letter, and was asked to state who the persons were who had insulted me. I think their names were taken down. Among them was Juan Bautista Dulac, the agent of the company; that is one of them.

Q. "Juan Bautista Marcana, La Palma, one Cabreara, and certain teamsters with other members of the populace whom I don't know?"

A. Teamsters.

Q. Teamsters?

A. There are no teamsters in the city.

Q. Do you remember what you said—is that substantially correct?

A. Might have been several persons; I did not mention that word teamsters.

By the COURT:

Q. He is asking you now what you said then?

103 A. I don't remember what I said; it might have been teamsters; I know I remember giving those names.

By Mr. COUDERT:

Q. Is that then substantially correct?

A. More or less—yes, sir.

Q. "With respect to the present officials I have no complaint to make of them nor of their chief General Hernandez inasmuch as at the date to which I have referred the legalist army had not made its entry." Is that your statement substantially?

A. I think it is pretty near what I said, because the legalist army had not. A great portion had come in.

By the COURT:

Q. He only asks you if you said so?

A. I don't remember.

By Mr. COUDERT:

Q. It should be stevedores and not teamsters?

A. There are no stevedores.

Q. Did you state, "The statements I have made had reference to the officials in charge on the 11th of August" that is the statement you made here in your letter?

A. I think I did, sir.

Q. "As to the threats against my life they were made by a mob which at the time that I went on board the steamer Callao threatened me with cries of 'Come ashore again,' 'Death to Underhill'—'Down with Underhill'?"

A. But I said more than that about that.

Q. Did you say that?

A. Will you allow me to repeat?

Q. No, I don't want to hear what you said.

The COURT: Not now.

A. I said that much—yes, sir.

Q. "After I left the boat Mr. Manuel Grillet"—you said a good deal more than that?

A. Yes, sir.

Q. What did you mean then by saying your deposition was a few lines, and it was so much longer here?

A. I said you had a pamphlet filled there, and this covered two pages of legal cap paper—of stamped paper. You must pro-

104 duce the stamped paper it was written on. It was the stamped paper from the government.

Q. "After I left the boat, Mr. Manuel Grillet escorted me under his protection to the Hotel Krone where I remained until the afternoon under an armed guard furnished by the mob itself?"

A. No, sir; the mob itself was not in it.

Q. "Under an armed guard"—was that true?

A. Under an armed guard headed by Hernandez's General Vega.

By the COURT:

Q. If you pay close attention, he is not asking you how it was, but how you said it was—whether you said that?
A. I did not say that—no.

By Mr. COUDERT:

Q. I will read it slowly; I am not asking what the facts were; I am asking you if you said this: "After I left the boat Mr. Manuel Grillet escorted me under his protection to the Hotel Krone." Was that what you said in substance?
A. Well, I remember mentioning Manuel Grillet's name, but I had other names there also.
Q. You may have said something else. Did you say that?
A. That was part of it.
Q. "Where I remained until the afternoon." Did you say that?
A. Yes.
Q. "Under an armed guard"—did you say that?
A. Yes.
Q. "Furnished by the mob itself." Did you say that?
A. No, sir.
Q. Were you asked "Who was present at this performance and can testify about it," and did you answer, "Mr. Manuel Grillet who protected me at the time;" did you answer that?
A. I think I did, sir.
I think I mentioned Mr. Manuel Bigot, also Mr. Guaderamma, also Mr. Olmeta and other persons whom I cannot specify. With regard to the doings of the night and what witnesses I had, I don't remember having said, "As it was late at night, I could not
105 distinguish any one and the only people who can testify are the people of the house." I didn't say as it was late at night I could not distinguish any one. The disturbance commenced early in the evening and men were coming in all the while. I made no remarks such as "As it was late at night I could not distinguish any one," because I remember telling them who I saw in the crowd. The half a dozen names I have mentioned here were those in the crowd bringing me from the boat to the hotel. I do not think this is correct; no, sir. This refers to the time after I had reached my house after being liberated from jail. That is not mentioned in there, by the way. The evidence I signed referred to the matter of the jail also. I gave them the names of witnesses as to the night performance. They were all of our servants who knew about that. I told them at the time who I had seen, who had participated in it. I gave them the names of people besides these. I told them who I saw through the street in the night. The phrase "The only people who can testify are the people of the house" must have reference to the servants. I don't remember having said that; I would not refer to niggers' testimony. I did not make any note of the servants. My servants signed nothing. It would not have amounted to anything, for a nigger isn't anything in that country. The statement is wrong, because it don't

state who was in the mob. I don't know as I mentioned the servants. I know they were there. It is very possible that I said they were there if they were there. I told them I was bothered all through the night.

When I was asked as to who was leading the mob I gave several names. I do not know that every man whose name I gave was summoned as a witness to know if he had taken part in anything hostile to me. They were not there. I know they were not there.

Q. Not at your house?

A. Oh, then I had a trial after I left the place, I suppose—I must have had a court-martial after I left, then.

Q. I merely want to know if you can tell me whether or
106 not all those persons whom you name were summoned as witnesses before this criminal court?

A. Not that I know of.

Q. You don't know anything more about the proceedings than what you have stated?

A. That is all about that case.

I was examined as a witness and this statement is partially correct and partially not. I know what is meant by martial law—a place being under martial law. That place has been under martial law several times. It was not under martial law when General Hernandez entered. I did not go out of the house after that arrest for some time. I know there were troops all over through the town. During his time I know it was not under martial law. People could go and come when they pleased and go on every vessel.

Q. It was under the rule of soldiers?

A. Well, only my house seemed to be the only house where there was rule of soldiers.

Q. You didn't go out of your house?

A. I did on several occasions and was sent back again; it was his orders.

Q. You left your house several times?

A. Yes.

He signed himself the "civil and military chief" and people could go and come when they pleased through the town. He appointed everything, president and all, before Crespo had reached Caracas. The president of the city—what we call the local government. So far as I know he established a local government as soon as he got in there, and there was no martial law and the civil tribunals were open to everybody. I appeared to be the only prisoner, and my wife. I think the revolution broke out before February, but I am not certain about it—in February, 1892. I thought it was in January or February. It seemed to me to be the early part of the year. With respect to the troubles in Bolivar, they seemed to begin to flock in—new soldiers—there in May or June. I mean the city of Bolivar. I know that outside they had been ever since trying to get congress together and could not get
any decision and they had struck out against the govern-
107 ment. That was along back in the early part of the year

and the revolution had been going, I think, in Venezuela all that time, although there had been no trouble in Bolivar until the spring or summer, as near as I can recollect.

Q. You said yesterday, looking at this Exhibit A, March 27, 1894, a letter to you from General Hernandez, that that stamp was the same stamp that had been used before that in Bolivar—the stamp in the corner (handing witness paper).

A. I said they had used a similar stamp to that. I suppose he merely took the same position that the man he killed filled. Whether this is the same stamp or not I cannot say.

Q. When you say "the man he killed" you mean General Carrera, who was slain in battle, don't you?

A. Yes, sir; all alone; it was not in any battle; it was after the battle was over.

Q. This speaks of the "civil and military headquarters of the Guayana section, territory of the delta, district of the river north of the Orinoco"—have you ever heard that?

A. Yes, sir.

Q. You have heard that designation of territory?

A. Yes, sir; being used by the previous military delegates.

Q. That is a well-known geographical territorial designation?

A. Yes, sir; that includes from the mouth of the River Orinoco up the mining district.

Map is shown witness, who is requested to point out the territory he has described.

The witness continues:

It is a very large territory, but don't comprise many habitations. That includes the delta. What they call the delta is the sunken ground at high river. It is all covered all the way up through here to and including Bolivar and to the north. It took in the town of Barrancas and Las Tablas, a little town, and the mining district Upata; that is 54 miles from Las Tablas. Going to the mines you pass three houses in that distance—Guasipati. As near as I understand it, it commenced here. This is the mouth of the River
108 Orinoco, and this territory extends on the north up to that, around in this way to Angostura and around here. That covers a good many miles of trees and timber. Fifteen-sixteenths is not settled at all. It is a rich country ready for foreign capital. I said that Carrera was killed after the battle. That is what I was told. It was a battle. He had fought these people, and the government was victorious and they escaped across the river called Ogaripa. I understood he was killed after the battle. I considered it so from the description given. Personally I do not know. I didn't see him after the battle. I only saw his boots and spurs, sword, etc. I couldn't tell from them whether he was killed in battle or not. I did not go to the American consul, and I did not say so. I said that my wife appealed to the American consul during my sickness. I have no personal knowledge about it, only what my wife and I saw in letters. I have got the consul's letters. I didn't go to the consul. I didn't say yesterday I went to the

consul. I did go to the consul in Trinidad. I am not playing on words with you. You gave me to understand, when I had trouble with him, I went to the consul when I was in Bolivar. I did not go in Bolivar. In Trinidad, when I arrived there, I went to the consul. I understood you fully to ask if I went to the consul in Bolivar. We were speaking of Bolivar. I went to the American consul after I arrived in Trinidad. That was about the 20th. On the night of the 20th and 21st I went in person. My wife, on her arrival there, had gone to him—to the same consul—and previous to that she had written to the consul in Bolivar. I made a statement of my grievances in writing. I have the original. He wanted me to put it in writing. I went to my house on the 11th of August. It was not on the 13th. I did not say so. I said I went to my house on the 11th of August after coming out of the jail, and I said on the 13th of August that I went with General Hernandez on board the steamer Socorro, to see about repairing her according to his orders. Prior to the 13th of August there was a brass cannon brought into the plaza, within a couple of
109 hundred feet of my house. It was not pointed at my house—nothing of that kind. Others were brought in afterwards. I heard they were brought from Trinidad—one of them or two. I do not know whether any of them were taken in battle. I do not think they had been. I do not know whether any of those were loaded. I only heard them loading this brass one in front of my door in August, about the 27th. I do not know whether it was loaded with shot or shell or simply with powder. I know they were going through the evolutions of loading it. I said something yesterday about General Hernandez asking me to vacate the house and my refusal. I think it was about the 21st of August. I did not go, because I did not consider, in the first place he had any right to ask that question. He demanded the house for his troops—for his Winchester men. He was the grand mogul. Had the power to put me out by force of arms. He could not get in—not unless they went over the fence. We would have stayed there. If he got me out of that house he would have had to put me out by force. He did not put me out. He made several demands. After that he sent a man who had furnished me wood for two or three years—was one of his generals. He sent him to implore me to let him have the house. I told him no, not unless they put the things in the street. I call imprisonment putting soldiers around my door, not allowing me to go out of my house. That is what I call imprisonment.

Redirect examination:

Q. You have been asked a number of questions with regard to your understanding of the political situation, president, congress, and so on, and who were the rebels. I would ask you what was your understanding upon this point, as to the situation at that time, namely, whether congress or the federal council ever elected a successor to Pallacio, if his term expired?

A. No, sir; I don't think they did.

Q. That was your understanding?

110 A. That was the general talk all around among the hotels there. I belonged to one of the clubs there—the French club.

By Mr. COUDERT:

Q. That no president had been elected?

A. They could not get congress together; they would not agree. I am sure that there was no successor elected to Pallacio. My understanding was that congress never commissioned a general of the army at that time. The government had their own generals and commanders. My understanding was that congress did not declare war. There is where the split was. There is where the Crespistas and the Gordos—there were two or three factions; they never agreed on these points and there is just the point exactly where they struck out and turned on to Crespo's side and offered to back him up. Sent immediately to the United States to get arms—they revolted against the government, in other words. I understand Crespo was a rebel. He was a revolutionist and had been before in other years. I was asked, I believe, about the repairing of steamers for the government and I think I stated that they had called on me previous to the repairing of the Nutrias to repair the steamer Apure, which I refused to do, which belonged to the same steamboat company. With respect to the Nutrias, the government people under Santos Carrera, military delegate, supposed—naturally supposed—that because I had refused to repair this first steamer that I must be in league with the revolutionary people because my book-keeper had gone over to their side and was this man's secretary. They wanted me to repair and examine the Nutrias. I agreed to examine her—told them what was the trouble and they wanted to know if I could repair it. I inadvertently said yes I could. They wanted me then to go to work and get her as quick as they could. They had got her loaded up with wood and she was disabled. I said I did not want to have anything to do with it. I assigned as a reason, "it will mix me up in revolutionary matters and I have never done any repairs to vessels during revolutions." It went along for a day or two

111 and they kept coming after me, the government people, to my house, and I told them I refused point blank to have anything to do with it. The secretary of Santos Carrera came to my house and told me they wanted to see me over at the commandancia, that is, the headquarters of the commander-in-chief. I went out that night and it had been rumored I was going to be put in jail for not fixing her. I bid my wife good-by that night. Did not expect to get back, for I supposed they were going to put me under arrest. I did not repair it finally. While over there I thought a way out of it. I said, "You have got no right to ask me as a foreigner to fix this vessel and compel me to do it, but if you will give me on order from the people who own this steamer, the board of directors here, to do this work, and they will employ me and put it

in writing and pay me for it, I will do it." They jumped at it immediately and kept me there as a prisoner. Just previous to this, they had sent a man over with a hammock. It was not in jail, it was in the rooms of the commandancia. Well, I waited there. They sent to the house or jail or wherever it might be for one of these men to give his word he would make a bargain with me to repair the steamer. They sent back word he should come to my house in the morning. I was liberated and escorted to my house, because it was night-time and guards were in the streets. It was some distance from my house and after they left me at the corner, then they went through their regular shout of "Halt!" and "Who comes?" &c. I knew all about it and got to my house. They made a contract with me and I repaired the Nutrias and received the money and the government used her as they had done previous to disabling. Never, at any time during these political troubles, did I take sides with either party or in any way break my neutrality. I might say I aided in this way, but without any intent. I had made a bargain with the Count de Montebello to run a gold mine together. He got the concession from English capitalists, and I had agreed to do the engineering work, and we had a certain
112 number of months to run it. The papers were drawn up in Trinidad and signed by the Venezuelan consul. I want to show you wherein I aided, if they might call it so. I do not know as that was aiding. I got this man out of the country, safe out of the government's hands. I knew he was a Crespista. I did not aid with any intent either one of the parties, either the government or the revolutionists, still my men were in their employ—in the rebels' employ. I considered the house in Trinidad my home after I had paid for the first month's rent in February. I never at any time expressed an intention to the defendant, General Hernandez, to abandon my business of the water works. I had brain fever and all that sort of thing, but I have never forgot myself so far as to abandon a business that cost from seventy-five to one hundred thousand dollars. With respect to the judges who called at my house when I was sick and when my testimony was given, one of them was R. G. Natera. I do not remember the others' names. These men were never judges in the town before General Hernandez came in, never, never. They were appointed by him; young men—young lawyers. When the defendant asked for my house in Bolivar for his Winchester men, no other place was offered to me to go to. The interview I had with General Hernandez was on the 14th of September. I made a memorandum, which is now shown me, at the time, on my return home.

Q. You have been asked, Mr. Underhill, with reference to some of the proceedings on the 11th of August in relation to the mob that took you from the boat. Will you state what occurred?

Defendant's counsel objects.

Objection sustained. Plaintiff excepts.

Recross-examination:

I did not, in any way, aid or abet what I considered the regular government, namely, the Pallacio government, except in this one thing. When I repaired the Nutrias, it was under the cir-
113 cumstances that I have stated. I did not furnish them with any munitions of war nor work at any. They took possession of my buildings. I did not furnish them with any munitions of war. I did not do anything. I have no other letter of General Hernandez than the one I produced.

JENNIE LAURA UNDERHILL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

I am the wife of the last witness. I am an American. I first went to Bolivar in 1886. These two pictures, Plaintiff's Exhibits 9 and 10, show the house where I and my husband lived at that time. That is the only house I lived in while I was in Bolivar. I was at Bolivar from 1886 till 1892, leaving there one time only to come home on a little visit. This house was not occupied while I was there in any way except by Mr. Underhill's family and our servants, certainly. Just our family. I remember the time of the political troubles in 1892 in the city of Bolivar. I have quite a vivid recollection of them. I was acquainted with the business that Mr. Underhill was in at that time, the water works. I knew how extensive they were.

Q. Do you know anything about how much Mr. Underhill had invested in them?

Defendant objects. Objection sustained.

Mr. CLARK: I intended to ask this witness all the questions with reference to the mob. I presume this will have the same ruling?

The COURT: That is before the 13th?

Mr. CLARK: Those are excluded?

The COURT: Yes, we will leave that all out.

I first left Bolivar to go to Trinidad in 1892 in quest of a house in February. We hired a house there. I went back to Boli-
114 var after that and went down again on the 22d of March. I took servants and furniture with me then. Took a good deal of furniture and silverware. I then established my house, my home, in Trinidad. My husband and myself did. I left there on the 14th day of June on the steamer El Callao to go to Bolivar, merely to find out if my husband was alive, or what was the reason I had not heard from him in five weeks. I went to Bolivar on the 14th day of June. I was living there from March to June and in June came back to Bolivar, but didn't give up my house in Trinidad. And then I was in Bolivar from the 17th of June until the 2d of October. I then went away without my husband, leaving him in Bolivar.

Q. Now, Mrs. Underhill, please come down to the time when the defendant came into Bolivar on the 13th of August. On the next

day, were you present at the interview when the committee came from General Hernandez with regard to fixing the Socorro?

A. Yes, sir.

Q. Did you hear what was said between Mr. Underhill and them?

A. Yes, sir.

Q. Please state it.

Question objected to and excluded.

At the time Mr. Underhill has testified to, when he was turned back at his gate and told he was not allowed to go out of his house, I was standing in our back gallery when he passed through the yard and went out of the back gate. After going out of the gate, I did not see him until after he returned, and he came back and told me——

Mr. COUDERT: I object.

The WITNESS: I thought I was merely answering the question.

Mr. COUDERT: What passed between her and her husband I object to.

The COURT: Strike it out.

Q. All I mean to ask was whether you were in a position to see what happened outside the gate.

A. I thought I only answered the question. I only saw
115 him go out of the gate and saw him come in the gate.

Q. Was it so hidden you could not see what happened or could not hear what happened outside the gate?

A. I could hear the voices, but I knew not what was going on. I only know my husband came back through the gate and then told me.

Q. You did hear the voices?

A. Yes, I could hear the voices, but I could not hear what was being said * * * made no effort to. I did not know there was any trouble out there.

After that I saw soldiers stationed around my house. Some of them had sabres, cutlasses, some different weapons, weapons of different kinds. A hat band around the hat with "Legalist" on. I first noticed these around the house, I think, on Monday, the 15th. There were two and often three continually stationed on our porch, right out of our bed-room, and where we mostly were. They remained there up to the time I came away, October 2d. They had their arms with them, they were evidently on guard there. I saw cannon placed there around the house; on the 22d of August the first one was placed there and three others afterwards. They were still there when I came away on October 2d.

I saw the defendant, General Hernandez, himself with reference to asking permission for Mr. Underhill to leave Bolivar. It was just when Mr. Underhill was convalescent, about able to be moved. He could have been moved on board the steamer. I went to General Hernandez in person and asked him. I went to his house or what I was told were his private quarters or private office, within

one block of our residence. I was admitted into the waiting-room and told I would have to wait awhile and I could see General Hernandez. After waiting about three-quarters of an hour, a gentleman appeared and asked my business. I gave him my card to take to Mr. Hernandez, and told him I preferred to have my business personally with the General. He stated Mr. Hernandez, he didn't think, could be seen; that I was to state my business to him and he would take it to Mr. Hernandez. Supposing I would
116 have to do so, I told him I came in reference to my husband's departure from Bolivar, to see if he would allow him to leave on that steamer. He went out of the room, was gone a few moments and said I would have to go about 10 o'clock to the government building to see General Hernandez in person. I did not see General Hernandez at that time. That is what happened there. Then I went at 10 o'clock to the government building and saw General Hernandez then. I made known my errand to him, that I came for a passport for my husband and myself to leave Bolivar and he said he could not grant it. I asked his reason. He said my husband would have to be detained there to answer the charge in a criminal court for insulting him in a letter he wrote him on the 24th day of September. So now I know what day I went there. It was about the 26th. When I left the house two or three soldiers followed me. I was accompanied by one of my servants. The soldiers followed me. His soldiers—General Hernandez's soldiers—followed me back. I was present when they demanded my house. Mr. Barrosa was one of those who demanded the house. He was then the prefect of the town, having been appointed on the 14th day of August by General Hernandez. The request of Mr. Hernandez was repeated that he should have Mr. Underhill's house for the Winchester men. Nothing was said as to where I should go. Hadn't the slightest idea where we were to be put. I had a vivid knowledge of the transactions concerning the demand for the mule. It was on the 19th of August, seven days after Mr. Hernandez entered the town, I remember, that his main officer, so considered, came to the house and asked for admittance to see Mr. Underhill. He could not be seen and I demanded or asked for his business. I did not allow Mr. Underhill to go. He was in great danger. Neither one of us ever appeared at the door. I saw all of these messengers who came to our house. I took it upon myself to see them for fear, as soon as my husband appeared at the window, he would be shot. I learned the business of this gentleman was to get Mr. Underhill's mule and cart
117 to be used by General Hernandez for some purpose. I made it known to my husband and he said he would not give up the animal. I returned to the window and gave his answer to the officer who took the answer to General Hernandez, I presume. This happened on the 19th, on Friday. The next day Mr. Manuel Grillet came personally from General Hernandez, and he was always admitted into our house, as he was also a friend of ours—we presumed so—and he asked again for the mule and insisted upon Mr. Underhill's giving it up, saying that his refusal to do so would make

things a great deal worse for him as long as he was held in the house; he should give in to every demand that was made. Mr. Grillet asked for the mule, insisted upon it. He came directly from General Hernandez for that purpose at that time. The mule did not go away on that day. Mr. Grillet went away with the same answer. The mule did not go away that day. Mr. Grillet returned to General Hernandez with the answer. On Sunday he returned and repeated his entreaties with Mr. Underhill, and on Monday an officer and three or four men of General Hernandez came to the door and demanded an entrance, and said they were going to have that mule; that it was General Hernandez's imperative orders it should be given up, and if I did not open that gate and allow him to come and get it, they would get over the wall and take the bar down and take the animal out themselves. That is word for word what they said. I came to Mr. Underhill and repeated it. He said: "I presume I have now got to give up the animal," and he gave him up, his sick animal which was hardly able to hobble out of the gate. He gave up the animal. The animal left us, not with Mr. Grillet. Mr. Grillet was not there, as I remember. The animal would have been in good hands, probably, if it had been with Mr. Grillet. When the animal came back, her back was covered with sores and she could hardly walk. She was returned on the Thursday following, on the 25th. We refused to take the animal.

118 Mr. Underhill did not see the officer who brought her back.

Mr. Underhill was taken sick about the middle of September. He was sick for three weeks. For two weeks he was seriously sick in his bed, in danger. He was out of his head. My husband had brain fever. It was caused by this continual worriment. During the period from August 13th to the time I left, I am not quite sure whether Mr. Underhill went out two or three times. The guards followed him when he went out.

The cannons were pointed directly to our door and window.

Harold Jennings was living at the house. So far as we know, he is now in Bolivar. I have sent for him to come north. Very often spoken to him about coming north. Any time he could find a chance to leave he might come. I told him that this case was coming up and if he could reach here in time for it, he would be a witness for us, that is all.

Plaintiff's counsel read the deposition of James Rowe, taken on the 20th day of March, 1894, *de bene esse*, he being about to sail for Europe.

JAMES ROWE, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

My name is James Rowe. I live in Plymouth, England. Am 37 years old. Am staying temporarily in New York. I am going to sail for England tomorrow morning on the Berlin. I might be back in a month or a couple of months. I am a seafaring man and my movements uncertain. I have to get my living that

way. In August, 1892, I was steward on board the El Callao, running between New York and Bolivar, calling at several ports between Bolivar, Venezuela. It was at Bolivar in August, 1892. The captain was Capt. Wetherell. Mrs. Wetherell was with him on that trip.

119 I know George F. Underhill and his wife, Mrs. Underhill, perfectly well. I saw them in August, 1892, the first trip. That was all I did see. I remember the occasion on that trip when Mr. and Mrs. Underhill were taken out of the little boat perfectly well.

Q. State what you saw on that occasion?

Mr. Coudert objects unless the question is connected with the defendant in this case.

Objection sustained.

Plaintiff's counsel then and there took an exception.

Q. Where were you?

Same objection, ruling.

Q. And you were near enough to the shore so that you could see?

Same objection, ruling.

Q. You say you saw guns pointed at them?

Same objection and ruling.

Q. And the mob actually hustled them out of the boat?

Same objection and ruling.

Q. And carried them along the streets?

Same objection and ruling.

A. On that trip I did not see them again. The vessel sailed away the same day. The mob did this, I should say, between seven and eight o'clock in the morning. My ship, when it sailed, went to Trinidad and afterwards direct to New York. We came back again in October, I think, the same year. I did not see Mr. Underhill that time. I tried to see him.

Q. State what you did.

Objected to by Mr. Coudert; excluded.

120 —. I went up the street towards Mr. Underhill's. I had a little provisions with me for him. When I got to his house, I could not get near his house because soldiers were there that wouldn't let me pass. They had just the usual blankets on them and muskets slung over their arms and white bands around their hats. I noticed that particularly because I stood alongside of them. I got near the house. They called out in Spanish. I said "English," and made towards the door. They came towards me and felt what I had in my parcel. I said, "Poco de carne." I know what that was, "A little meat." I tried to get by them. They

wouldn't allow me to pass. Then I backed and I went up to get in at the other door of his house. I found there the same resistance just as I had before. Not only resistance, but I saw several cannons pointed towards his house. I could not go into the house. I tried to get to the door but the soldiers said: "No, no, no." I went right around the house and tried to get in his back door. I could not get in there. In fact, I didn't go to try. There were soldiers standing around—no use to try. I went back to the ship. I tried to get to the house again the last evening I was there, four or five days after. It was the night before I sailed. My experience this time was merely the same as when I went up the first time. Soldiers were there still—the same sort of men. I could not tell whether they were the same men. They were dressed in the same uniform exactly. They would not allow me to go near the house at all. On the first trip in August, the little boat, the ship's boat, had been sent ashore for Mr. Underhill and Mrs. Underhill. The chief officer sent them to bring them to the ship. Mr. Underhill had a residence at Trinidad at that time. I know he had. I have been at his house in Trinidad.

Cross-examination by Mr. COUDERT:

I am not an American by birth or nationality. I am an Englishman. I was steward on the El Callao. I had been in the vessel one year, nine months. I am not on her yet. I have left my vessel last Saturday, the Salamanca. This vessel sails between here and the West Indies. I knew Mr. Underwood before
121 I saw him in the small boat. I had seen him in Bolivar. I saw him every trip I went there. I was friendly with him. I used to go to his house. He lived in the same house all the time. The house was in a square in a large open place and stood by itself. There was a large open space all around. I don't know whether that open square and that house belonged to the State or not. I don't know how long the Underhills lived there. I don't speak any Spanish. I can say "Manana" and such little things, but I cannot speak Spanish. I am sure they understood what I said. As showing that they understood me they put their hands against my breast and said "No, no, no." I am perfectly sure they understood what I said, because they did that. I had only the parcel. I had no written paper or permission. I simply went there as a messenger from the ship. All I said or could say to explain was "A little meat." They did not allow me to go into the house. I cannot state the date of the month of my first experience there. It was in August. I cannot tell the day of the month. I heard the chief officer send the boat for Mr. and Mrs. Underhill. I heard him tell the men to go ashore and fetch Mr. Underhill and his wife. That was the first I knew of it that they were coming to my ship. That was all I know of it. On our ship, we had other people from Ciudad Bolivar. We had a lot of government people there who were escaping that night—came on board in the night. I do not know that our people were helping them to get away at night. We got

their luggage on board and I helped them at night to get away. I knew they were running away from the way it was done at night. I know what they were running away for. I heard that the rebels were coming to town. They were going away because they were frightened. I did not know whether Mr. Underhill was frightened. I didn't know why he was getting away. I knew there was a political agitation there, political trouble, a revolution. Some of the parties to the revolution went away that night. I do
122 not know who was the commander in authority when I was there. I heard several names. Hernandez, I heard that name distinctly. I would not swear that General Hernandez was the chief in authority. I heard his name. Heard that he was a conspicuous man there. I could not swear that I heard he was the general commander there. I heard some such name as that—Hernandez—all the time. I did not inquire who was the head of the government there. I did not know under whose orders the soldiers were there. I did not know how long the cannons had been there. I know nothing except there had been a disturbance. I saw soldiers there. Three or four came over to me and there were others all around. They spoke Spanish to me. I could not give the words. I could not understand. They understood that I wanted to get into that house. I made them to understand that I wanted to get into that house. They did not understand what business I had there without any papers or authority. All I could say was "Poco de carne, Manana," and little things. I did not suppose that being an Englishman I could get in anywhere. I do not think that at all. Having told them that I was an Englishman and that I had un poco de carne, I was very much surprised that they did not let me in. I could not tell you the length of Mr. Underhill's house—a pretty long house. I do not know whether it was 25 or 250 feet. If I saw the house, I could tell you something about the size. I am not a practical sailor. I am only a steward. I can tell the size of my kitchen on the ship by my eye. I wish I could go into the measurements of the house. It was all and more than 25 feet long. I should say it was 100 feet long. I couldn't have knowledge whether it was 150 feet long. I know the house was a good-sized house. It was white outside—a stone house. This photograph now shown me is the house. I do not observe a flag on it. It was evening when I got there. The flag in the picture is Spanish—at least American. I see the stars there—United States of America. It was evening when I went there and I never saw any flag.
123 It was a private building because I had been to Mr. Underhill's house many a time.

It was a private house because some one lived in it. It did not look like a public building. This is the kind of a house men put up to live in with their wives generally. That represents the rear; I cannot see the front. The guns were pointed on the rear of the house. I could not swear there was a public square on the rear. I know very well the hospital is there, handy.

The witness is shown a paper purporting to be a plan showing

the Underhill house and the surroundings, being the same plaintiff heretofore referred to and shown during the examination of the plaintiff.

The witness continues:

This marked "Underhill" would be the house. This marked "frente" would be the front of the house. I could not give any judgment as to whether the part marked "puerta" would be the rear of the house. I had been there several times. Always got in unmolested until that time, until the revolution. I got there without difficulty. At the part marked "I" there were barracks. I do not know about artillery. I saw cannon there. I do not know whether in those barracks there was an artillery regiment or artillery troops or not. I know there were artillery on that public place on the rear of the Underhill house and a great many soldiers and barracks. The soldiers were standing all about. There were no guns on the front arch of the door, not that front door. The only guns that pointed to this house were all in the rear. Nothing at the front door, only soldiers. Three came over to me and several sat on the stoop. I could not say the number. I never counted them. I know three came over and spoke to me. There were soldiers scattered right around. There were cannon at the end of the house. I know it was pointed straight at Mr. Underhill's door and window. You show me the house and I can tell where they were located. I do not understand this drawing. I am not a
124 drawer. I know that the house had a rear and two sides. In front there were no cannon. I did not see any guns on the rear. The guns were at the end. There were soldiers at the front or back. I cannot show you where the guns were on that plan. If I had a picture of the house, I would. I have described it as well as I can. I know there are various public buildings around there. I have heard of a theatre there. I cannot form it on the plan at all. "B" represents a square, which is said to be Bolivar square, "Plaza de Bolivar," what we call the park. Next to the park, coming down, with "E" in it, I remember there were barracks for soldiers there. There were tanks at the rear or back of the house, large tanks. What they were there for I do not know. I never saw a house of that size with so large a tank for its own purposes. I do not know that I had. Do not know what the tanks were there for. I should never give it a thought that from seeing these tanks and seeing how large they were that they were for something else besides supplying the wants of Mr. and Mrs. Underhill. It strikes me in no particular at all, because I do not see that I had any need to think what they were for. I did not observe a convent there. I did not see General Hernandez while there (looking at Mr. Hernandez, who is present). No, sir; I never saw him. I had visited this house before where Mr. Underhill lived with Mrs. Underhill, about every trip I made. I do not suppose a dozen times. I used to make a trip every five or six weeks. I went there, I suppose, 5, 6, 8, 10 times. I walked about the place very little.

Q. Did you observe when you were there, before this month of August, whether there were soldiers three or not?

A. Never went by there; not that trip, because it was evening when I went there, and I found I could not go there after eight o'clock, and they told me it was just the same up at the other end of the town. I went there at night, never in the day. I was admitted after eight o'clock before. I never got my work finished to go ashore until between seven and eight o'clock. There was
125 no interference with a man's landing after eight o'clock. There was no interference with going there after eight o'clock, only at the time of the revolution. At the time of the revolution you couldn't go there after eight o'clock. Couldn't go outside the town at all. I don't know, but this was outside the town. I don't know the boundaries of the town. I know I couldn't go down the river side the other way. You asked me what time I went there. I didn't go there after eight o'clock during the revolution. It was only one trip. We were there before it broke out. I was not informed that after eight o'clock I couldn't go there. I didn't try to go there that trip. You asked me what time I went to the house. I told you what time I generally went to the house. I didn't mean to say anything about this trip at all. I didn't say that I didn't go on this occasion after eight o'clock, because during the revolution I couldn't go there after eight o'clock. You asked me when I went there. I said I heard something about not being allowed to go out of the city after eight o'clock during the revolution. I heard that at that time. I never went ashore on that trip. The trip, when we carried off the other men, I didn't come ashore at all. I never took any notice of any soldiers before that time on my former trips around or near the house occupied by the Underhills.

Q. But there might have been?

A. No, not near the house. I looked around and saw whether there were buildings there, barracks. I know what barracks are. I saw barracks there the first time I went there. Barracks is a place for soldiers. I do not know whether there were any soldiers inside. I suppose the barracks were there only for the soldiers. If I took any notice I would have seen barracks there. I never was stopped going to Bolivar before. I observed long before this trip of mine in October that there were barracks for soldiers all around Mr. Underwood's house—a good distance from his house, not close to his house, about 30 or 40 yards away.

126 Redirect examination by Mr. CLARK:

I am not a draftsman. I cannot tell a draft when I see it. I do not understand drawings very well. I do not understand this sketch that has been shown me, marked "Defendant's Exhibit Drawing of Streets." I would not attempt to say whether that is drawn correctly or not. I would not swear. I do not understand drawing at all. I never was stopped before when I went to see Mr. Underhill before this one occasion in October. I never saw soldiers standing around his house before as they did then. There were

probably a couple of dozen right around the house—hanging around there. Some sat on his steps. Some laid against the wall of the house. They were guarding the house. I could understand enough to know that. When the soldiers stopped me, I got about seven or eight feet from the front door. There was no question in my mind but that they did stop me. They would not let me go any farther. They did know that I wanted to get into the house. I tried to push the way to the house. They wouldn't allow me to go to the house. They put their hands on my breast, pushed me back, and said, "No, no." I do not know what street the house is on. I do not know the name of a street in Bolivar. The photograph that was shown to me does not show where the cannons were pointed to. I cannot see the door at all. Cannons were not on this side of the house, not on the side of the house shown in the picture. The side of the house towards which the cannons were pointed is what I call the end of the house. I do not know the name of any street in Bolivar. I had never seen those cannon on any other trip. I saw three cannon. They were pointed directly at Mr. Underhill's door and window. There is no question in my mind on that, because they wouldn't let me pass inside the cannon. They made me go around.

Recross-examination by defendant's counsel:

127 Recalling what I said about the trip in August, when we carried away at night these men who had been engaged in the revolution, I do not remember leaving in the morning in great haste with our ship. I do not remember that we left without all the necessary and usual papers. I remember that we did not discharge our cargo because we took the government people away from the town. As to whether we were afraid, that was with the captain. I only obeyed orders. I know we did not discharge our cargo because we had taken these men on board. I do not know whether we had to pay a fine the next time we came on again for going away without our necessary papers. They did not belong to my department.

JAMES WETHERELL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

My home is in Brooklyn. In 1892 I was captain of the steamer El Callao, plying between New York and the northern ports of South America. I was at Bolivar with my vessel in August, during the revolution there.

Q. Did you see the mob taking Mr. Underhill from the little boat on August 11th?

Objected to by defendant's counsel. Excluded by the court.

Q. State what you saw.

Same objection, ruling.

After that trip I came back to Bolivar with my vessel in October.

I did not, on the last trip, go ashore at Bolivar. The steward on my vessel at that time was James Rowe. I could not see Mr. Underhill's house from my vessel. It was too far away.

Cross-examination:

When I returned I had some trouble because of leaving
128 irregularly. That is the reason they gave me. It was true. When I came back, General Hernandez was in command, they said. I believed it. I knew it, I may say. I appealed to him for protection. I was afraid to go ashore without his help. I understood he was in authority; that he was in authority there—the great mogul. You put it about right. I would not go ashore without his aid and protection. I thought I could not do so safely. I wrote the letter now shown me. That is my handwriting and signature. It was between the 3d and 12th or 13th of October. I carried off the government officials at Bolivar, rather the men that were the government officials when I went there. I was asked to give them refuge, and I gave it. I do not suppose you find any fault. It is immaterial if you do. I think it was on a Sunday in October.

The letter is offered in evidence by defendant's counsel, and marked "Defendant's Exhibit E, March 28, 1894."

The letter reads as follows:

"STEAMSHIP EL CALLAO.

"SENOR HERNANDEZ: I have a message by bearer requesting a visit from me. I have been ill since I came here, and am so yet, but, if possible, tomorrow I will try and comply with your request, and wait on you at what hour you may desire. At the same time, I understand the feeling of the people is rather bitter against me, and I hope you will give me your safe conduct.

"Yours respectfully, JAMES WETHERELL."

Plaintiff's counsel offers the testimony of Mr. Wetherell with regard to the mob of the 11th of August.

Objected to by defendant's counsel.

Excluded by the court, and plaintiff's counsel then and there excepted.

Mr. COUDERT: I renew my motion for a direction, and I am
ready to argue it. I think the matter is now very plain as
129 to any question which your honor has any doubt. The Supreme Court of the United States has settled it. It is manifest it was not in any private capacity General Hernandez did whatever he did. Today they have proved that so far from imprisoning him in his house, they tried to get him out, and he would not go. General Hernandez asked repeatedly for the house, and he said no; they would not let him get in. But, apart from that, it is manifest whatever was done by the defendant, was done by him as the government *de facto* of that place, and the testimony is unqualified about that. There was a revolution that had been lasting six

months. General Hernandez was connected with Mr. Crespo, who was recognized on the 6th of October, while this very thing was going on. He was recognized as the government, and certainly General Hernandez was the government *de facto* of that district, a district which, according to Mr. Underhill today, extended over forty, fifty or sixty miles. He said there were not many houses there—two or three, or four, or whatever there might be. Without elaborating it, I submit to your honor I am entitled to have a direction to the jury.

The COURT: What do you claim?

Mr. CLARK: That Mr. Underhill was confined in his house by the orders of General Hernandez; that he was confined in the city of Bolivar, refused—stopped from going away.

The COURT: Refused passports?

Mr. CLARK: Refused permission to go away; that General Hernandez was in absolute control there, without authority, without right, but as a matter of fact he had control, and could prevent any one from going away or leaving their house, as he did, by the use of his soldiers; that he had acted entirely without authority; that all the officials had left the place; that this was not done by an official in any way; he was not an official of the government, either of the city, or the State, or the nation; that it was a rebellion, a revolution, and the word "revolution" implies that it is not done by authority.

130 The COURT: Take the proof just exactly as it stands. You understand the plaintiff to have said he was a general, had command of soldiers, fought a battle, had been victorious, and then came into the city and took possession? You understand that? Am I right about that?

Mr. CLARK: Yes, sir.

The COURT: As I remember, the witness said the civil authorities had all gone, and he took control of the city as a general of soldiers, army of some size or other under his command, and had possession in that way?

Mr. CLARK: Yes, sir.

The COURT: What he did—do you claim he did anything except as such a commander? Something was said about soldiers, and cannon, and so on about the house, and being pointed at the house, but I understood the witness to say they were not pointed to attack the house.

Mr. LOGAN: Keeping him from going out.

The COURT: I did not understand him to stick to that. He started to go out and soldiers ordered him back.

Mr. LOGAN: They certainly were not pointed towards his house to protect him. They would have been pointed the other way to protect him.

Mr. COUDERT: Were they loaded?

Mr. LOGAN: They looked loaded.

The COURT: There has nobody said anything about it, except when he tried to go away. The soldiers had hat-bands, or marked in a particular way, and they told him he could not leave. Mrs.

Underhill asked leave to go, and he refused. That is about the substance of your case.

Mr. CLARK: Except that he had no authority to do this, even as a military commander.

The COURT: This is what he did.

Mr. CLARK: Without reference to the law.

The COURT: After he got there he assumed control of that place—had command. You understand that?

Mr. CLARK: He assumed command.

Mr. LOGAN: He had the physical power.

131 The COURT: He had it as commander.

Mr. LOGAN: He had the physical power, because he had these soldiers or people under him who would obey him. We do not concede the legality of his authority.

The COURT: I am not asking you about that. I am asking you whether you claim he did anything at all except as acting commander of the soldiers who had won this battle a little way out, and then he came into the city and assumed control, and his refusal was when he was applied to as such an officer having control. Do I understand that right?

Mr. LOGAN: His soldiers restrained Mr. Underhill in his house, contrary to the constitution of Venezuela; prevented him from going abroad; imprisoned him; subjected him to all these indignities; that he did it because he had the power, and the reason why he was able to do it was that he had these soldiers—these armed men under him, who would obey him.

The COURT: When Mr. Underhill wanted to go he applied to him as the man of whom he had got to ask leave to go, because he knew——

Mr. LOGAN: He would stop him if he did not.

The COURT: That is right.

Mr. LOGAN: As a matter of physical power; yes, sir.

The COURT: Then your case turns on whether you can maintain your action for keeping the plaintiff there, when what he did he did as such commander-in-chief in control of military authorities, although it is not shown he was acting directly under the government. You have not got that yet, except that he assumed to act, and in October that was recognized.

Mr. CLARK: It was only recognized October 23rd.

Mr. COUDERT: October 6th, and admitted on the record it was October 6th.

Mr. CLARK: That Crespo got into Caracas. Our Government did not recognize it until October 23rd. October 23rd the new government was recognized.

The COURT: Who was the new government?

Mr. CLARK: Crespo.

132 Mr. LOGAN: It is not shown that Hernandez was the new government?

Mr. CLARK: It is not shown that Hernandez was under Crespo.

The COURT: Mr. Underhill said he understood General Hernandez was under Crespo.

Mr. CLARK: He was in sympathy with that movement, but as an independent general.

Mr. LOGAN: Hernandez raised troops in the north, and they afterwards came together.

The COURT: This is your case—whether you can maintain an action against an officer who has got so far as to have an army under his command and in control of a place, civil and military, and tells a man that he must not go.

Mr. LOGAN: I think that is substantially it—whether we can maintain an action against a man who, without any authority of law, organizes—gets together armed men who will obey him, and drives out the previously constituted authorities, and assumes to be the dictator, king, president, congress, judge of all the courts, and everything else.

The COURT: He has got following enough to have an army and take and maintain control.

Mr. LOGAN: He has got following enough to have the physical power—if he said that Mr. Underhill's head must come, he could cut it off.

The COURT: If he said stay in, he must stay in.

Mr. LOGAN: Or if he said go out; if he wanted his mule, come and take it.

The COURT: If he said all the people should stay in their houses, they would have to stay.

Mr. LOGAN: I guess they would; there would be a lot of them get shot if they didn't.

The COURT: Can you cite me to an authority where a civil action has been maintained against a person who had such military control?

(After argument.)

The COURT: I should like to look into this matter a little;
133 my personal inclination is not quite well enough settled. I am inclined to stop here until tomorrow morning at half past ten.

Mr. COUDERT: I have a very full brief of authorities, if your honor will look at it.

The COURT: I will take your brief, and the other side's.

The plaintiff's counsel also requested the court for leave to go to the jury upon the following questions:

1. Whether the defendant imprisoned the plaintiff.
2. Whether the defendant assaulted the plaintiff.
3. Whether the acts committed by the defendant were committed as military acts.
4. Whether the acts committed by the defendant were within the ordinary rules of civilized welfare; the city of Bolivar at that time being in no disorder.
5. Whether there was any necessity or justification for the defendant's acts against the plaintiff as military acts.
6. Whether the defendant, at the time he imprisoned or assaulted

the plaintiff, was a civil officer of Venezuela or any political division thereof, either *de facto* or *de jure*.

7. Whether the defendant, at that time, as such civil officer (even if we admit him for this purpose to be such), had a right to commit the acts against the plaintiff.

8. Whether the defendant, at the time of the acts, was a military officer of Venezuela or any political division thereof, either *de facto* or *de jure*.

9. Whether the defendant, at such time (even if we admit him to be such military officer), had the right to commit the acts against the plaintiff.

10. Whether or not, at the time the acts were committed, the defendant, or the political party to which he belonged, had been recognized by the Government of the United States as a government *de facto* or as having beliigerent rights.

11. Whether the defendant, at the time of the acts com-
134 plained of, had any commission from, or was acting under any authority from Crespo, or the leaders of the revolution.

The court, however, denied each of said requests to go to the jury and granted an exception to the denial of each of said requests, which exception the plaintiff's counsel then and there took. Thereupon the court rendered its opinion on the defendant's motion for the direction of a verdict as follows:

The COURT: Since the court adjourned last evening I have taken considerable pains to inquire into this subject and look into these cases; and, giving them such consideration as I have been able to give them, I am not able to see that the plaintiff would have a case anyway unless it is assumed or testified to that the defendant was commander-in-chief of soldiers. There is no evidence that the defendant himself did anything about keeping the plaintiff in his house, holding him there, except as it was shown that he was prevented from going away by soldiers who were under the command of the defendant; so that what the plaintiff claims to recover for is for what it is claimed to be proved that the defendant did in the way of restraining him in his house as commander-in-chief of soldiers. Well, now, I do not think the justification as commander-in-chief rests on recognition by our Government, but rests on the fact of being in a state of war, military rule, the civil authorities suspended, and he was in command. That is the foundation of the plaintiff's case—that the defendant was in command, and what was done was done pursuant to his command as the supreme commander there. In such a case I do not understand there is a right of action; that is a justification—that is, the civil law is suspended; that is silent; the military law is in force; so, however unfortunate it may have been to the plaintiff, he has sued the defendant as a commander-in-chief of the forces for what, as such, he did to him, which, in my view, does not furnish any right of action whatever; any more than a Virginia farmer could have sued Gen-
eral Beauregard for what they did at the battle of Bull
135 Run—tore up his grass and made mischief there. If he had

brought such a suit he would have been defeated—could not have recovered. If such a suit could be maintained, why, a great many men in this country would not have much of an estate left. I do not think there is any relief in court; this is my impression; this is what I think after studying it over as carefully as I could since we adjourned yesterday afternoon. Therefore we should gain nothing by spending any further time with the case. If I am wrong about that, the plaintiff has a speedy and handy way of review to make it right. So, Mr. Clerk, you may take a verdict for the defendant by direction of the court.

Thereupon the court directed that a verdict be rendered for the defendant by direction of the court and the plaintiff's counsel then and there excepted.

Thereupon, pursuant to said direction of the court, a verdict was taken for the defendant and the plaintiff's counsel then and there duly excepted.

The court granted a stay of all proceedings for sixty days, with sixty days to make a case and bill of exceptions.

The foregoing comprises all of the evidence and all of the proceedings had upon the trial of this action.

And inasmuch as the said matters produced and given in evidence on the said trial, and the said exceptions, do not appear by record of the said cause in the circuit court of the United States for the eastern district of New York, the plaintiff has prepared and caused to be settled this bill of exceptions as a record thereof in accordance with the statutes of the United States, which said bill of exceptions the said court hereby signs and orders on file this 21st day of May, 1894.

HOYT H. WHEELER, *Judge.*

136 The foregoing bill of exceptions is correct as to form.

LOGAN, CLARK & DEMOND,
Plaintiff's Attorneys.
COUDERT BROTHERS,
Defendant's Attorneys.

Dated May 19, 1894.

And now the stay of proceedings herein is hereby vacated, and upon the filing of the foregoing bill of exceptions let judgment be entered on the verdict.

HOYT H. WHEELER.

(Endorsed:) Bill of exceptions. Filed May 21, 1894.

United States Circuit Court, Eastern District of New York.

GEORGE F. UNDERHILL, Plaintiff and Plaintiff in Error,
against
JOSE MANUEL HERNANDEZ, Defendant and Defendant in Error.

Assignment of Error.

The plaintiff and plaintiff in error, George F. Underhill, by his attorneys, Logan, Clark & Demond, pursuant to the rules and practice of the courts of the United States, hereby assigns the following errors committed in this cause, and says that in the record and proceedings herein there are manifest errors in this, to wit:

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I.

The court erred in refusing to receive in evidence the paper marked Plaintiff's Exhibit 4 for identification.

II.

The court erred in excluding plaintiff's evidence with respect to the cost and value of the income received from the water-works system and property of the plaintiff erected in Ciudad Bolivar.

III.

The court erred in excluding evidence offered by plaintiff concerning the assault and imprisonment of the plaintiff on the 11th and 12th of August, 1892.

IV.

The court erred in excluding the evidence of the witnesses Rowe and Wetherell as to what occurred when the plaintiff and his wife were taken from a boat by a mob in August, 1892, at Ciudad Bolivar.

V.

The court erred in refusing to submit the case to the jury as a whole.

VI.

The court erred in refusing to submit to the jury the question as to whether the defendant imprisoned the plaintiff.

VII.

The court erred in refusing to submit to the jury the question as to whether the defendant assaulted the plaintiff.

VIII.

The court erred in refusing to submit to the jury the question as to whether the acts committed by the defendant were committed as military acts.

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IX.

The court erred in refusing to submit to the jury the question as to whether the acts committed by the defendant were within the ordinary rules of civilized warfare, the city of Bolivar at that time being in no disorder.

X.

The court erred in refusing to submit to the jury the question as to whether there was any necessity or justification for the defendant's acts against the plaintiff, as military acts.

XI.

The court erred in refusing to submit to the jury the question as to whether the defendant, at the time he imprisoned or assaulted the plaintiff, was a civil officer of Venezuela or any political division thereof, either *de facto* or *de jure*.

XII.

The court erred in refusing to submit to the jury the question as to whether the defendant, at that time, as such civil officer (even if it be admitted that he was such) had the right to commit the acts proved to have been committed against the defendant.

XIII.

The court erred in refusing to submit to the jury the question as to whether the defendant, at the time of the acts proved, was a military officer of Venezuela or any political division thereof, either *de facto* or *de jure*.

XIV.

The court erred in refusing to submit to the jury the question as to whether the defendant, at the time proved (even if it be admitted that he was such military officer), had the right to commit the acts proved to have been committed by him against the plaintiff.

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XV.

The court erred in refusing to submit to the jury the question as to whether or not, at the time the acts, as proved were committed, the defendant, or the political party to which he belonged, had been recognized by the Government of the United States as a government *de facto* or as having belligerent rights.

XVI.

The court erred in refusing to submit to the jury the question as to whether the defendant at the time of the commission of the acts complained of had any commission from, or was acting under any authority from, Crespo or the leaders of the revolution.

XVII.

The court erred in directing a verdict for the defendant and against the plaintiff.

XVIII.

The court erred in not overruling the defendant's motion for a direction of a verdict for the defendant.

Wherefore, the plaintiff and plaintiff in error prays that the judgment of the circuit court of the United States for the eastern district of New York in favor of the defendant and against the plaintiff be reversed.

Dated New York, June 4, 1894.

LOGAN, CLARK & DEMOND,
Attorneys for Plaintiff and Plaintiff in Error.
58 William Street, New York City.

SIR-: You will please take notice that the within is a copy of assignment of error duly filed and entered herein in the clerk's
140 office of U. S. circuit court, eastern district of New York, on the 6th day of June, 1894.

Dated New York, June 6, 1894.

Yours, &c., LOGAN, CLARK & DEMOND,
Att'ys for Pl'ff, 58 William Street, New York.

To Coudert Bros., att'ys for def't.

(Endorsed:) U. S. circuit court, eastern district of N. Y. Geo. F. Underhill, pl't'ff and pl't'ff in error, against Jose Manuel Hernandez, def't and def't in error. Assignment of errors. Logan, Clark & Demond, att'ys for pl't'ff in error, 58 William street, New York. Filed June 6, 1894.

Circuit Court of the United States for the Eastern District of New York, in the Second Circuit.

GEORGE F. UNDERHILL, Plaintiff,
against
JOSE MANUEL HERNANDEZ, Defendant. } Supersedeas Bond.

Know all men by these presents, that we, George F. Underhill, of the city of Brooklyn, county of Kings and State of New York, as principal, and Clarence Kenyon, of 170 St. Mark's avenue, Brooklyn, N. Y., and Charles E. Phelps, of Bay Shore, L. I., as sureties, are held and firmly bound unto the above named Jose Man-
141 uel Hernandez, in the sum of four hundred dollars ($400.00), to be paid to the said Jose Manuel Hernandez, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 4th day of June, in the year of our Lord, one thousand eight hundred and ninety-four.

Whereas, the above-named George F. Underhill has prosecuted a

writ of error to the United States circuit court of appeals for the second circuit to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York.

Now, therefore, the condition of this obligation is such that if the above-named George F. Underhill shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make his said writ of error good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

GEORGE F. UNDERHILL. [L. S.]
CLARENCE KENYON. [L. S.]
CHARLES E. PHELPS. [L. S.]

STATE OF NEW YORK, } ss:
County of New York, }

On this 4th day of June, 1894, before me, a notary public in and for the county of New York, personally appeared the above-named George F. Underhill, principal, and Clarence Kenyon and Charles E. Phelps, sureties, to me severally personally known and known to me to be the individuals who executed the foregoing bond, and severally acknowledged to me that they executed the same for the uses and purposes therein set forth.

GEORGE A. BAKER,
[SEAL.] *Notary Public, N. Y. Co.*

142 STATE OF NEW YORK, } ss:
County of New York, }

Charles E. Phelps, being duly sworn, says: I reside at Bay Shore, L. I., in the State of New York, and am a freeholder therein. I am worth the sum of $1,000.00 over and above all debts and liabilities and exclusive of property exempt from levy and sale under execution.

CHARLES E. PHELPS.

Sworn to before me this 4th day of June, 1894.

GEORGE A. BAKER,
[SEAL.] *Notary Public, N. Y. Co.*

STATE OF NEW YORK, } ss:
County of New York, }

Clarence Kenyon, being duly sworn, says: I reside at Brooklyn, in the State of New York, and am a householder therein. I am worth the sum of $1,000.00 over and above all debts and liabilities and exclusive of property exempt from levy and sale under execution.

CLARENCE KENYON.

Sworn to before me this 4th day of June, 1894.

GEORGE A. BAKER,
[SEAL.] *Notary Public, N. Y. Co.*

The within bond is hereby approved to operate as a supersedeas this 5th day of June, 1894, and writ of error allowed and citation issued.

HOYT H. WHEELER, *Judge.*

143 SIR-: You will please take notice that the within is a copy of a supersedeas bond duly filed and entered herein in the clerk's office of U. S. circuit court, eastern district of N. Y., on the 6th day of June, 1894.

Dated New York, June 6th, 1894.

Yours, &c., LOGAN, CLARK & DEMOND,
Att'ys for Pl'ff, 58 William St., New York.

To Coudert Bros., att'ys for def't.

(Endorsed:) U. S. circuit court, eastern district N. Y. George F. Underhill, pl't'ff, against Jose Manuel Hernandez, def't. Supersedeas bond. Logan, Clark & Demond, att'ys for pl't'ff, 58 William street, New York. Filed June 6, 1894.

UNITED STATES OF AMERICA, } *ss.:*
Eastern District of New York, }

I, B. Lincoln Benedict, clerk of the United States circuit court for the eastern district of New York, do hereby certify that the foregoing record is a true copy of the pleadings, proofs and papers on appeal made up to be transmitted on appeal to the United States circuit court of appeals, for the second circuit, in the suit of George F. Underhill against Jose Manuel Hernandez.

In witness whereof I have hereunto set my hand and [SEAL.] the seal of this court this 5th day of July, 1894.

B. LINCOLN BENEDICT, *Clerk.*

144 UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between George F. Underhill, plaintiff, and Jose Manuel Hernandez, defendant, a manifest error hath appeared to the great damage of the said George F. Underhill, plaintiff, as is said and appears by the complaint; we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place before the judges aforesaid on the 5th day of July, 1894, that the record

and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States, ought to be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the [SEAL.] Supreme Court of the United States, this 6th day of June, in the year of our Lord, one thousand eight hundred and ninety-four, and of the Independence of the United States, the one hundred and eighteenth.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

HOYT H. WHEELER, *Judge.*

June 6th, 1894.

145 Circuit Court of the United States for the Eastern District of New York.

GEORGE F. UNDERHILL, Plaintiff and Plaintiff in Error,
against
JOSE MANUEL HERNANDEZ, Defendant and Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To Jose Manuel Hernandez, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the second circuit, to be holden in the city of New York, on the 5th day of July, 1894, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein George F. Underhill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated June 5th, 1894.

HOYT H. WHEELER, *Judge.*

146 At a stated term of the United States circuit court of appeals for the second circuit, held at the city of New York on Tuesday, the eighteenth day of December, A. D. 1894.

Present: The Honorables William J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

GEORGE F. UNDERHILL, Plaintiff in Error,
vs.
JOSE MANUEL HERNANDEZ, Defendant in Error.

This case coming on to be heard, Mr. Salter S. Clark is heard on behalf of the plaintiff in error.

Mr. F. R. Coudert is heard for the defendant in error.

WEDNESDAY, *December* 19, 1894.

147 This cause being still on hearing, Mr. F. R. Coudert continues his argument on behalf of the defendant in error.

Mr. Salter S. Clark is heard in reply.

C. A. V.

148 United States Circuit Court of Appeals, Second Circuit.

GEORGE F. UNDERHILL, Plaintiff in Error,
vs.
JOSE MANUEL HERNANDEZ, Defendant in Error.

WALLACE, *Circuit Judge:*

This is a writ of error by the plaintiff in the court below to review a judgment for the defendant, entered upon the verdict of a jury pursuant to the direction of the trial judge. The suit was for false imprisonment and assault and battery of the plaintiff, committed by the defendant at the city of Bolivar, Venezuela. The acts complained of consisted in the detention of the plaintiff at his own residence in the city of Bolivar, under a guard of soldiers stationed near the house, from August 13th to October 18th, 1892, by the authority of the defendant, during which time the plain-

149 tiff was not permitted to leave the house without an escort of soldiers, and was several times refused a passport to leave the city, for which he made application to the defendant. During this period the defendant was in command of the city as a military officer. A revolution had been organized against the government of Venezuela, and an army had been mustered against the adherents of the recent president, whose term of office had expired, and who, it was claimed by the revolutionists, no longer represented the legitimate government. The principal parties to this conflict were those who recognized Palacio as their chief and those who followed the leadership of Crespo. The defendant belonged to the revolutionary party, and commanded its forces in the vicinity of Bolivar. Early in August an engagement took place between the forces of the two parties near Bolivar; the revolutionists prevailed, and August 13th the defendant entered Bolivar at the head of his forces and assumed command of the city. From that time until the plaintiff was permitted to leave Bolivar the defendant was the civil and military chief. Early in October the revolutionary party prevailed generally, and took possession of the capital of Venezuela; and on the 26th day of October, 1892, the Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the Government of the United States, pursuant to instructions from the State Department to our minister, to recognize the new goverment, provided it was "accepted by the people, in the possession of the power of the nation, and fully established."

The plaintiff was a citizen of the United States who had constructed a water-works system for the city of Bolivar under a contract with the government, and was engaged in supplying the place

with water. He also carried on a machinery repair business. The evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to
150 operate his water works and his repair works for the benefit of the community and the revolutionary forces; it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive. The trial judge ruled, at the request of the defendant, that upon these facts the plaintiff was not entitled to recover, and directed a verdict for the defendant against the exceptions of the plaintiff.

The important question presented by the assignments of error arises upon the exception to the direction of a verdict for the defendant. This ruling proceeded upon the ground that because the acts of the defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor.

Consideration of comity and of the highest expediency require that the conduct of States, whether in transactions with other States or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a State have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own governments. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary, to the arbitrament of war. It would not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of States to be subjected to the examination of the legal tribunals of other States. Influenced by these reasons, and because the acts of the official representative of the State are those of the State itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within
151 their own States in the exercise of the sovereignty thereof.

In Moondalay *v.* Morton (1 B. C. C., 469), the master of the rolls, while retaining jurisdiction of a suit which involved the private transactions of the East India Company, said: "They have rights as a sovereign power; they have also duties as individuals. If they enter into bond in India, the sums secured may be recovered here. I admit that no suit will lie in this court against a sovereign power for anything done in that capacity." In Nabob of Arcot *v.* The East India Co. (4 B. C. C., 180), the answer to a bill in equity alleged that all the transactions mentioned in the bill were of a political nature, and matters of State, and the court dismissed the suit upon that ground. In The Duke of Brunswick *v.* The King of Hanover (6 Beavan R., 7), the master of the rolls concluded an elaborate discussion of the liability of the defendant to a suit in chancery with the opinion that the King of Hanover, although a subject of Great Britain, was exempt from all liability to be sued in the courts of this country for any acts done by him as King of

Hanover. Upon an appeal from his judgment dismissing the cause to the House of Lords (2 H. L. Cas., 1), that tribunal decided that the defendant, notwithstanding he was a British subject, and was in England exercising his rights as such when sued, could not be made to account, in the court of chancery, for acts of state, whether right or wrong, done by him abroad in virtue of his authority as sovereign. The decision was put, not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign effected by virtue of his sovereign authority abroad. The Lord Chancellor said that "a foreign sovereign coming into this country cannot be made responsible here for an act done in his sovereign character in his own country;" that "the courts of this country cannot sit in judgment upon the act of a sovereign effected by virtue of his sovereign authority abroad; an act not done as a British
152 subject, but supposed to be done in the exercise of his authority, vested in him as sovereign." * * * In Hatch *v.* Baez (7 Hun., 596), the New York supreme court decided that an action could not be maintained in the courts of the State against the former president of the Dominican Republic for acts done by him in his official capacity, although he had ceased to be president when the suit was brought. The court said: "We think that by the universal comity of nations, and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory. * * * To make him amenable to a foreign jurisdiction for such acts would be a direct assault upon the sovereignty and independence of his country. * * * The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done and protects the individual who did them because they emanated from a foreign and friendly government."

The law officers of the United States have uniformly advised the executive department that individuals are not answerable in foreign tribunals for acts done in their own country in behalf of their government by virtue of their official authority.

In 1794, one Collet, lately the French governor of Guadaloupe, was arrested in this country in an action brought against him for the seizure and condemnation of a vessel. The matter having been brought to the attention of our Government, it was referred to the Attorney General, and he advised that the defendant, being subject to process, the Government could not then intervene, but added his opinion that if the seizure of the vessel were admitted to have been an official act done by the defendant by virtue or under color of the
powers vested in him as governor, it would of itself be a suf-
153 ficient answer to the plaintiff's action, and that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers, and that the extent of his authority could with propriety or convenience be determined only by the constituted authorities of his own nation." 1 Op. Att'y Gen., 45–46. In 1797, in the case of Sinclair, the Attorney General expressed the

opinion "that a person acting under a commission from the sovereign of a foreign State is not amenable for what he does, in pursuance of his commission, to any tribunal of the United States." 1 Op Att'y Gen., 81. In 1871 the Attorney General advised the Secretary of State as follows: "It has often been laid down that before a citizen of one country is entitled to the aid of his government, in obtaining redress for wrongs done him by another government, he must have sought redress in vain from the tribunals of the offending power. The object of this rule plainly is to give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid all occasion for international discussion." In 1872, in the case of the steamer Tipitapa, the Attorney General advised the Secretary of State in a case where an officer of a party of armed men, acting under an order of the judicial officer of the port of Granada, had seized an American vessel at that port, the seizure having been made for the purpose of enforcing a supposed legal right, "that the government ought not to make reclamation in behalf of the owner, as it is presumable that if the proceedings were illegal the judicial tribunals of Nicaraugua would afford redress."

Conspicuous amongst the acts which are sheltered by this principle of international law are those of military officers in command of the armed forces of the State. According to one of the most recent commentators upon international law (Hall, section 102), officers in command of armed forces of the State, and their subordinates and soldiers, are not in any case amenable to the civil
154 or criminal laws of a foreign State, in respect to acts done in their capacity as agents, for which they would be punishable or civilly responsible if done in their private capacity. This doctrine was sanctioned by our own Government in 1841, in the case of McLeod, who was under indictment for murder in a State court of New York. He had been engaged as a member of the colonial forces in repelling an attack made upon Canada by an armed force from the United States, and had assisted in the destruction of a vessel moored on the American shore of the Niagara river, during which an American citizen was killed. The British government, through its minister at Washington, demanded his release upon the ground that the destruction of the vessel was a public act, of persons in Her Majesty's service, obeying order of the superior authorities, and, therefore, according to the usages of nations, could only be the subject of discussion between the two governments. Mr. Webster, then Secretary of State, acceded to this view, stating that, "the Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorized by the British authorities, the individuals concerned in it ought not, by the principles of public law and the general usage of civilized States, to be holden personally responsible in the ordinary tribunals of law for their participation in it." The courts of New York refused to release McLeod at the intervention of the General Government, and he was tried, but acquitted on proof of an alibi. The episode led to the enactment, by Congress in 1842, of the provision,

now section 753, United States Revised Statutes, by which the courts of the United States are authorized to issue a writ of *habeas corpus*, "where a person, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted, under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction
155 of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations."

Upon principle it cannot be important whether the acts of military authorities, when called in question, are done by the authority of a *de jure* or *titular*, or of a *de facto* government. In either case, if they are done in the legitimate exercise of belligerent powers, they are not ordinarily attended with civil responsibility. This principle has been recognized by the Supreme Court of the United States in cases in which the civil liability of Confederate soldiers, for acts done as members of the insurgent forces, during the rebellion, was under consideration. Ford *v.* Surget (97 U. S., 594); Freeland *v.* Williams (131 U. S., 405).

As was decided in Williams *v.* Bruffy (96 U. S., 176), the government of the Confederate States was a *de facto* government of an inferior class. "It never represented a nation; it never expelled the public authorities from the country; it never entered into any treaties, nor was it ever recognized as a government by an independent power."

Ford *v.* Surget was an action brought by the plaintiff to recover the value of certain cotton destroyed during the war of the rebellion in the State of Mississippi; and the court held that the defense that it was destroyed by the defendant, acting under the orders of the military authorities of the Confederate States, was a good justification. Freeland *v.* Williams was a bill in equity to invalidate a judgment of the court of the State of West Virginia obtained against the defendant for a tort committed by him as a soldier of the Confederate army. One of the questions discussed was whether the judgment was void, inasmuch as it proceeded upon the grounds that the defendant was civilly responsible as a trespasser for an act done by him as a Confederate soldier in accordance with the usages of civilized war. In the prevailing opinion the court said:
156 "The case as presented to us shows that the trespass for which the original judgment was rendered was of that character, and it is argued with much force that the court which rendered that judgment had no jurisdiction in the case, or, at all events, had no jurisdiction to render such a judgment, and that it is therefore void. It follows, from this view of the subject, that the court in which it was originally rendered had jurisdiction to set aside or annul it without the aid of the constitutional provision of the State of Virginia, and that on that ground alone the decree we are called upon to review must be affirmed. In this view of the subject some of the judges of this court concur." Again the court say: "If it be true that, when the original action was presented to the circuit court of Preston county, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence

of a war flagrant in that part of the country, that court should have proceeded no further, and its subsequent proceedings may be held to have been without authority of law. While it is not necessary to hold that the judgment, as presented by the record, is absolutely void, it may be conceded that a court of equity, in a proper case, can prevent the enforcement of it." In a dissenting opinion Mr. Justice Harlan insisted that the judgment was not void, but conceded that the complainant was not civilly responsible if his act was one of legitimate warfare as a soldier in the Confederate army.

The acts of the defendant as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround them if they had been performed subsequently. The organization of which he was a part, represented that kind of a *de facto* government which is described
157 in Williams *v.* Bruffy, "such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State and its citizen or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation." By its success the revolutionary party vindicated its claim to recognition as the legitimate government of Venezuela, and achieved a justification in the estimation of foreign governments and their legal tribunals for the acts of its military forces as complete and ample as though those forces had been employed by any sovereign power. After the recognition of the new government by the United States, the courts of this country must accord to those who, throughout the progress of the civil war, acted as the agents of the people of Venezuela, the position of official representatives of the State. The act of recognition by our Government neither added to, nor detracted from, the responsibility of the people of Venezuela for any prior injuries which citizens of the United States may have suffered on her soil from the hands of her *de facto* authorities; but these responsibilities, in our judgment, are to be adjudicated by the two governments by international action, according to the principles of international law applicable to such cases.

For these reasons we conclude that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.

The various requests made to the court on behalf of the
158 plaintiff for instructions to the jury, either involve propositions of law, which, according to the views we have expressed, were properly refused, or propositions for the submission of questions of fact, as to which there was no conflict of evidence, and which, therefore, the trial judge was not required to submit to the jury. If the trial judge, in directing a verdict for the defendant, enunciated a rule which, to its full extent, may not obtain, because

it implies that the defendant would not be civilly responsible, even in a court of Venezuela, for any act done by him as a military commander, his disposition of the case was nevertheless proper, and the result is not affected by his expression of an erroneous opinion.

The judgment is affirmed.

159 At a stated term of the United States circuit court of appeals for the second circuit, held in the court-room of said court, in post-office building, in the city of New York, on the 28th day of January, 1895.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

GEORGE F. UNDERHILL, Plaintiff in Error,
versus
JOSE MANUEL HERNANDEZ, Defendant in Error.

The defendant in error having applied to this court that a mandate issue to the circuit court of the United States for the eastern district of New York without delay, and it appearing to the court that this is a proper case for the immediate issuing of a mandate, on motion of F. R. Coudert, attorney for the defendant in error—

160 Ordered that a mandate issue out of this court to the circuit court of the United States for the eastern district of New York on the affirmance by this court of the judgment of said circuit court.

W. J. W.
E. H. L.
N. S.

161 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 160, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George F. Underhill against Jose Manuel Hernandez, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-five and of the Independence of the said United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

162 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which George F. Underhill is plaintiff in error and Jose Manuel Hernandez is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the southern district of New York, and we, being willing, for certain reasons, that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States—

163 Do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

164 [Endorsed:] Supreme Court of the United States. No. 926. October term, 1894. George F. Underhill *vs.* Jose Manuel Hernandez. Writ of certiorari.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify as a return to said writ the annexed copy of a stipulation (page 4), the original of which stipulation was filed in my office on the 21st day of March, A. D. 1895, and still remains on file and of record in said office, in the action entitled George F. Underhill, plaintiff in error, against Jose Manuel Hernandez, defendant in error.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the district above named, this 25th day of March, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

JAMES C. REED, *Clerk.*

165 United States Circuit Court of Appeals for the Second Circuit.

GEORGE F. UNDERHILL, Plaintiff in Error,
vs.
JOSE MANUEL HERNANDEZ, Defendant in Error.

It is hereby stipulated and consented on the part of the above-named plaintiff in error and defendant in error that the certified copy of the record in this case, which was transmitted from the United States circuit court of appeals to the Supreme Court of the United States and filed with the petition of the plaintiff in error upon the motion for a certiorari, shall be taken with this stipulation as a full and complete return to the certiorari granted herein and dated the 20th day of March, 1895.

Dated New York, March 21st, 1895.

F. R. COUDERT,
JOSEPH KLING,
Counsel for Defendant in Error.
F. R. COUDERT, *Solicitor.*
SALTER S. CLARK,
Counsel for Plaintiff in Error.
LOGAN, CLARK & DEMOND, *Solicitors.*

(Endorsed:) United States circuit court of appeals for the second circuit. George F. Underhill, pl'ff in error, against Jose Manuel Hernandez, def't in error. Stipulation. Logan, Clark & Demond, att'ys for pl'ff in error, 58 William street, New York. United States circuit court of appeals, second circuit. Filed Mar. 21, 1895. James C. Reed, clerk.

166 [Endorsed:] Case No. 15,810. Supreme Court U. S., October term, 1896. Term No., 238. Geo. F. Underhill, P. E., *vs.* Jose Manuel Hernandez. Writ of certiorari and return. Office Supreme Court U. S. Filed Mar. 27, 1895. James H. McKenney, clerk.

926

FILED

Supreme Court of the United States.

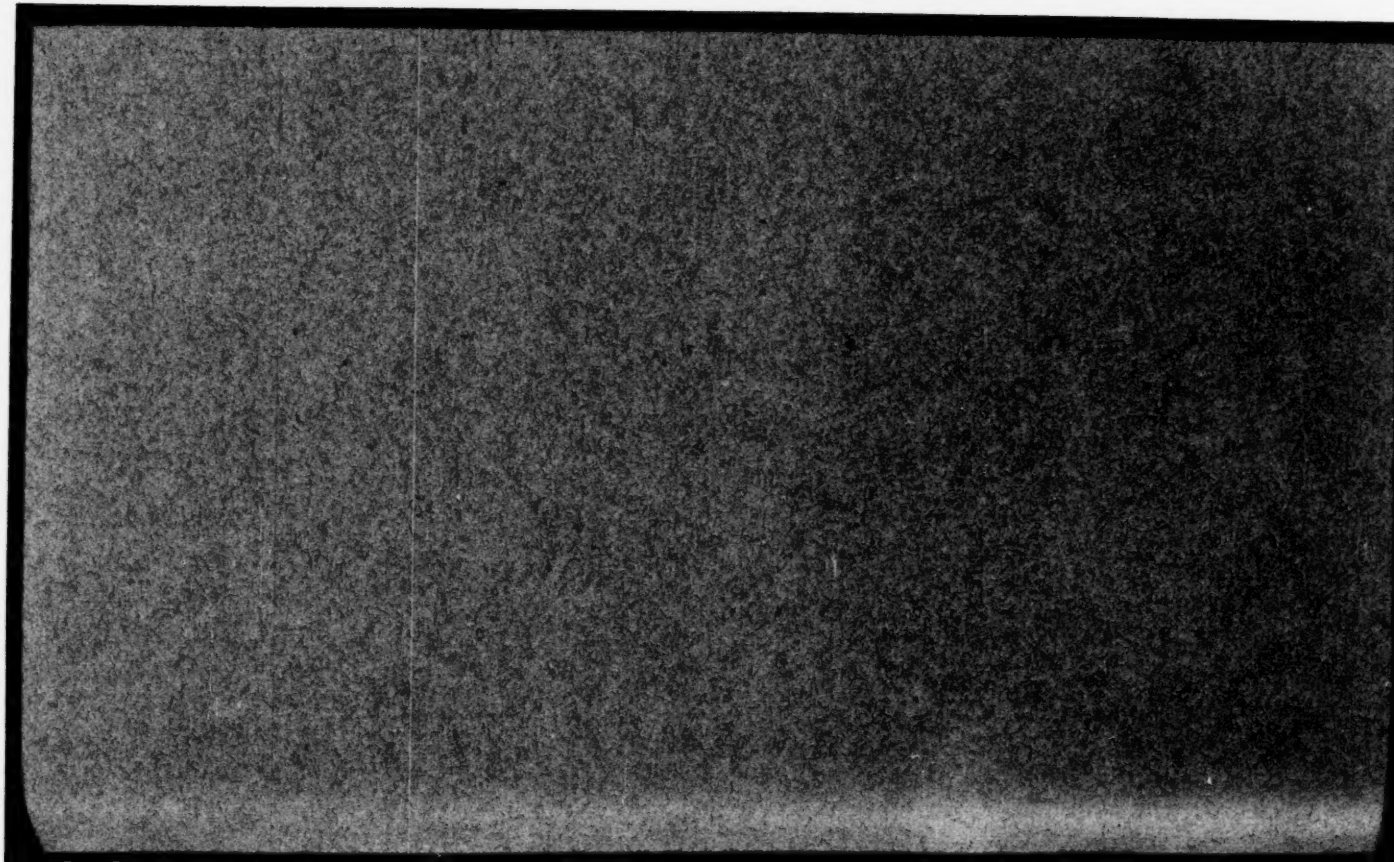
IN THE MATTER

OF

THE PETITION OF GEORGE J. UNDERHILL FOR A WRIT OF CERTIORARI, &c., TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION.

SALTER S. CLARK,
Of Counsel for Petitioner,
58 William Street,
N. Y. City.



To the Supreme Court

OF THE UNITED STATES OF AMERICA.

The petition of GEORGE F. UNDERHILL for a writ of certiorari, directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of

GEORGE F. UNDERHILL,
Plaintiff and Plaintiff in Error,
against
JOSE MANUEL HERNANDEZ,
Defendant and Defendant in Error.

The said petitioner respectfully shows to this Court as follows:

I.—That your petitioner was, at the time of the commencement of this action, a citizen and resident of the State of New York, and that the defendant was, at that time, a citizen of the Republic of Venezuela, in South America.

II.—That on the 2d day of November, 1893, your petitioner commenced an action against the abovenamed defendant, Jose Manuel Hernandez (here-

after to be called, respectively, plaintiff and defendant), in the Supreme Court of the State of New York, to recover the sum of $25,000 damages; alleging that the defendant had falsely imprisoned the plaintiff in the months of August, September and October, 1892, at the City of Bolivar, in the Republic of Venezuela, and had, during the said time, assaulted and beat the plaintiff (*Record, fol. 10*). The case was removed, on application of the defendant, into the Circuit Court of the United States for the Eastern District of New York, and thereafter the defendant filed his answer, denying the allegations of the complaint, and alleging that whatever was done or authorized by the defendant, was done or authorized by him as an official of the Venezuelan Government at that place (*Record, fol. 87*). The case thereafter came to trial before Hon. Hoyt H. Wheeler and a jury, and, after the offering of evidence and the examination of witnesses on the part of the plaintiff, the Court, at the close of plaintiff's case, directed that a verdict be entered against the plaintiff, and refused to submit the case, or any part thereof, to the jury, to all of which due exception was taken by the plaintiff (*Record, fol. 538*).

The ground of this disposition of the case was that the defendant was a person having soldiers under his command and was *de facto* in power in Bolivar at that time, and that in such cases there was no right of action anywhere, without reference to the character of the acts done or the character of his power; that is, whether he represented the legitimate Government of Venezuela or an insurrectionary government. The theory was, that the existence of the state of war, and the fact that the defendant was *de facto* in power at Bolivar, took away all right of action (*Record, fol. 534*).

Judgment in favor of the defendant was thereupon entered, assignments of error were filed by the plaintiff, and a writ of error was, thereafter

duly sued out to the Circuit Court of Appeals for the Second Circuit.

The writ of error came on to be heard before the Honorables William J. Wallace, E. Henry Lacombe and Nathaniel Shipman, constituting the Circuit Court of Appeals for the Second Circuit, and, after argument, the judgment was affirmed, his Honor, Judge Wallace, writing the opinion, which is hereto annexed, marked "Exhibit A."

III.—FACTS ESTABLISHED BY THE EVIDENCE. That the following are the facts established by the evidence at the trial:

The plaintiff, a citizen of the United States, was, with his wife, living in the City of Bolivar, Venezuela, in the year 1892. Under a contract with the government, he had constructed the water works system of that place at a cost of $75,000 to $100,000 (*Record, fol. 446*), and that he owned and was managing the same. In March, 1892, the Underhills had established their domicile at Trinidad, the English island, situated near the coast (*Record, fols. 269, 452*), but retained, also, their house at Bolivar. During the spring and summer of that year a very high inundation of the Orinoco River had occurred, covering Underhill's pump works so as to stop all possible operations of the water works system, until after the events which form the basis of this suit. The false imprisonment continued from August 13th to October 18th; and the fact was established that the water works could not have been started until after that time (*Record, fols. 272, 313, 378*).

During the spring and summer of that year (1892) the country was having revolutionary troubles. It appears that one Palacio had been president of Venezuela under a term expiring March 1, 1892 (*Record, fol. 337*); that the congress, whose duty it was to elect his successor, had failed to do so, and had never agreed upon a successor (*Record, fols.*

337, 373, 377, 437). The Palacio party remained in possession of the offices everywhere throughout the country (*Record, fol. 331*). Several groups of revolutionists were formed against the Palacio party, such as the Crespistas, Gordos, &c. (*Record, fols. 438, 335*). The plaintiff, Underhill, was careful to maintain a strict neutrality throughout (*Record, fols. 331 and 444 to 449*). Crespo, the leader of one of the factions, finally succeeded in capturing the capital, Caracas, on October 6, 1892 (*Record, fol. 262*). A new government, with Crespo as president, was formed, and was recognized by the United States October 23, 1892, after the happening of all the events sued upon in this action (*Record, fol. 240*).

The position of Hernandez, the defendant, in the revolution does not appear, except that he was in revolt against the constituted authorities—was an insurgent. He raised troops for revolutionary purposes (*Record, fol. 264*); but it does not appear that he had any commission from Crespo or from any other revolutionary authority, or that he was working under their direction. It does not appear that there was any general plan of operations, military or otherwise.

Early in August General Santos Carrera, a military commander for the existing government at Bolivar, went out against Hernandez. The result was the death of Carrera and the taking possession of the town of Bolivar by Hernandez (*Record, fols. 265, 386, 429, &c.*), the government officials having fled therefrom.

The soldiers led by Hernandez had no uniform, unless a white band around the hat can be called such, having different legends upon it (*Record, fol. 283*), and carried different sorts of weapons (*Record, fol. 448*).

Upon entering the town, the defendant immediately took complete control of everything (*Record, fols. 353, 356, 509*); called himself "Civil and Mili-

tary Chief" (*Record, fol. 312*); used the government's stamp on his documents (*Record, fols. 312, 351*), and appointed judges and other officials there; but his authority, though absolute in the town, did not extend beyond it (*Record, fol. 382 et seq.*). As a matter of fact, there were practically no inhabitants outside of the town for many miles (*Record, fol. 380*), most of that country being entirely uninhabited.

The defendant immediately placed a guard of soldiers around the plaintiff's house, who stopped him when he attempted to leave the house (*Record, fols. 291, 328, 455*). For two months he was imprisoned there (*Record, fol. 295*), soldiers being stationed around it night and day, front and rear (*Record, fols. 294, 458, 493*); twice the plaintiff went in person to Hernandez to demand that he be allowed to leave the place, the soldiers accompanying him there and back (*Record, fols. 299, 313, 462, &c.*). The Underhills received frequent warnings from friends not to show themselves at the doors or windows, as their lives were in danger (*Record, fols. 302, 464*). There was firing of musketry towards the house all the time (*Record, fol. 303*). They were called contemptuous names, and reviled as "Yankees" (*Record, fol. 303*). The U. S. flag was a special object of attack. Cannon were brought to the house, loaded, and left pointed towards the doors and windows of the house to threaten them (*Record, fols. 300, 320, 328, &c.*). These troubles made the plaintiff violently sick with brain fever, in danger of death (*Record, fols. 301, 467*).

For a month no reason whatever was given by Hernandez for keeping the plaintiff there; then the reason given was that he was necessary to run the water works, although it was shown that he had perfectly competent assistants who would stay, and, besides that, it was impossible to do anything with the water works then; finally, the pretended reason for detaining him was to answer to some

sort of a court for a pretended personal insult to Hernandez.

The defendant demanded from the plaintiff that he sell the water works business (*Record, fol. 317*), and told everybody that he intended to break the contract (*Record, fol. 370*). The plaintiff was finally allowed to go on October 18th.

During all this time the place was perfectly quiet and orderly. People were coming and going as they pleased through the town, and to and from the town on every vessel (*Record, fol. 422*).

The Revolutionary Party was never recognized by the United States Government or by any foreign government as having belligerent rights during the struggle. The number of soldiers in the field does not appear, nor whether there was any general organization, civil or military, with a responsible head, among the Revolutionists. The regular government, however, had full diplomatic relations with the United States, Mr. Scruggs being Minister to Venezuela at that time (*Record, fol. 399*).

Under the civil law of Venezuela the personal rights of the individual are secured, both to foreigners and natives, and an action for false imprisonment and assault and battery given (*Record, fols. 117, 119. 133, 151*). International law is a part of the municipal law of Venezuela, its constitution giving it special application to all cases of civil war (*Record, fol. 234*).

IV.—The Circuit Court of Appeals, in its decision, assumes the defendant to have been a part of the Revolutionary Party, which finally succeeded in Venezuela. The ground of the decision, after assuming this point, is that the courts of a foreign country have no jurisdiction to consider civil actions against the sovereign power of a country, or any official representing, for the time being, such sovereign power, or acting under the color of such sovereign right, and that the final success of the Revolutionary Party retroactively establishes such

party and all its officials to have been the sovereign power of the country.

Upon the other hand, your petitioner maintains the law to be, as established by numerous cases in this court and other courts, that, in cases of insurrection or revolution, the courts of a foreign country must recognize the prior state of affairs as continuing until the executive branch of the government has, by its recognition, established a different state of affairs; that, therefore, so far as the courts of this country are called upon to decide the question, they must assume all insurrectionary acts by the Revolutionists of Venezuela to have been unlawful, for the reason that the Government of the United States had never recognized such Revolutionists as having belligerent rights of any sort; that success does not act in our courts retroactively to legitimatize the acts of a revolutionary party, nor give it belligerent rights, unless the executive department of our Government has so declared, and that the mere recognition of a new government is not a recognition of the rightfulness of the methods by which it arose.

Your petitioner also contends that it should have been left to the jury to decide whether the defendant was a part of a regular organized army, having the right to make war, or was a mere filibuster, acting for himself alone; and whether his acts had any military justification, or were merely capricious or malicious.

V.—Your petitioner urges the following as reasons for bringing this case within the rules of this court allowing a certiorari.

(1). It is a question involving important principles of International Law and the comity of nations. It is the policy of our system to have the Supreme Court decide all such questions. For that reason the statute directs all appeals in prize cases to be directly to the Supreme Court.

(2). The decision is in conflict with many decisions of the Supreme Court, which hold that the courts cannot look into the question as to whether a civil war exists in another country, so as to excuse the acts of insurgents, until the Executive Department has recognized in them the existence of belligerent rights. Relying upon those authorities, the Itata Case, 56 Fed. Rep., 504, decided by the Circuit Court of Appeals for the Ninth Circuit, has held that the status of revolutionists is to be decided by the court in the same light as they were regarded by the Executive Department of the United States at the time of the alleged offenses, irrespective of subsequent success or recognition.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case, and the record thereof, to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

STATE OF NEW YORK,
Southern District of New York, } ss.:
City and County of New York,

GEORGE F. UNDERHILL, being duly sworn, says: That he has read the foregoing petition, and that the same is true to his own knowledge.

That deponent's knowledge is derived from the record in this case and from what has taken place in his presence and hearing upon the trial.

GEO. F. UNDERHILL.

Sworn to before me this 15th day of February, 1895.

GEO. A. BAKER,
Notary Public.
N. Y. County.

I hereby certify that I have examined the foregoing petition, and, in my opinion, the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

SALTER S. CLARK.

Exhibit A.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

GEORGE F. UNDERHILL,

Plaintiff in Error,

vs.

JOSE MANUEL HERNANDEZ,

Defendant in Error.

WALLACE, Circuit Judge.

This is a writ of error by the plaintiff in the Court below to review a judgment for the defendant, entered upon the verdict of a jury pursuant to the direction of the Trial Judge. The suit was for false imprisonment and assault and battery of the plaintiff, committed by the defendant at the City of Bolivar, Venezuela. The acts complained of consisted in the detention of the plaintiff at his own residence in the City of Bolivar, under a guard of soldiers stationed near the house, from August 13th to October 18th, 1892, by the authority of the defendant, during which time the plaintiff was not

permitted to leave the house without an escort of soldiers, and was several times refused a passport to leave the city, for which he made application to the defendant. During this period the defendant was in command of the city as a military officer. A revolution had been organized against the government of Venezuela, and an army had been mustered against the adherents of the recent President, whose term of office had expired, and who, it was claimed by the revolutionists, no longer represented the legitimate government. The principal parties to this conflict were those who recognized Palacio as their chief and those who followed the leadership of Crespo. The defendant belonged to the revolutionary party, and commanded its forces in the vicinity of Bolivar. Early in August an engagement took place between the forces of the two parties near Bolivar; the revolutionists prevailed, and August 13th the defendant entered Bolivar at the head of his forces and assumed command of the city. From that time until the plaintiff was permitted to leave Bolivar the defendant was the civil and military chief. Early in October the revolutionary party prevailed generally, and took possession of the capital of Venezuela; and on the 26th day of October, 1892, the Crespo Government, so called, was formally recognized as the legitimate government of Venezuela by the Government of the United States, pursuant to instructions from the State Department to our minister, to recognize the new Government, provided it was "accepted by the people, in the possession of the power of the nation, and fully established."

The plaintiff was a citizen of the United States who had constructed a water works system for the City of Bolivar under a contract with the government, and was engaged in supplying the place with water. He also carried on a machinery repair business. The evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate

his water works and his repair works for the benefit of the community and the revolutionary forces; it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive. The Trial Judge ruled, at the request of the defendant, that upon these facts the plaintiff was not entitled to recover, and directed a verdict for the defendant against the exceptions of the plaintiff.

The important question presented by the assignments of error arises upon the exception to the direction of a verdict for the defendant. This ruling proceeded upon the ground that because the acts of the defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor.

Consideration of comity and of the highest expediency require that the conduct of States, whether in transactions with other States or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a State have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own governments. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary, to the arbitrament of war. It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of States to be subjected to the examination of the legal tribunals of other States. Influenced by these reasons, and because the acts of the official representative of the State are those of the State itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own States in the

exercise of the soverignty thereof. In Moondalay *v.* Morton (1 B. C. C., 469), the Master of the Rolls, while retaining jurisdiction of a suit which involved the private transactions of the East India Company, said: "They have rights as a sovereign power; they have also duties as individuals. If they enter into bond in India, the sums secured may be recovered here. I admit that no suit will lie in this court against a sovereign power for anything done in that capacity." In Nabob of Arcot *v.* The East India Co. (4 B. C. C., 180), the answer to a bill in equity alleged that all the transactions mentioned in the bill were of a political nature, and matters of State, and the Court dismissed the suit on that ground. In The Duke of Brunswick *v.* The King of Hanover (6 Beavan R., 1), the Master of the Rolls concluded an elaborate discussion of the liability of the defendant to a suit in chancery with the opinion that the King of Hanover, although a subject of Great Britain, was exempt from all liability to be sued in the courts of this country for any acts done by him as King of Hanover. Upon an appeal from his judgment dismissing the cause to the House of Lords (2 H. L., Cas. 1), that tribunal decided that the defendant, notwithstanding he was a British subject, and was in England exercising his rights as such when sued, could not be made to account, in the Court of Chancery, for acts of state, whether right or wrong, done by him abroad in virtue of his authority as sovereign. The decision was put, not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign effected by virtue of his sovereign authority abroad. The Lord Chancellor said that "a foreign sovereign coming into this country cannot be made responsible here for an act done in his sovereign character in his own country;" that "the courts of this country cannot sit in judgment upon the act of a soverign effected by virtue of his sovereign authority abroad; an act not done as a British

subject, but supposed to be done in the exercise of his authority, vested in him as sovereign." * * * In Hatch *v.* Baez (7 Hun, 596), the New York Supreme Court decided that an action could not be maintained in the courts of the State against the former president of the Dominican Republic for acts done by him in his official capacity, although he had ceased to be president when the suit was brought. The Court said: "We think that by the universal comity of nations, and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory. * * * To make him amenable to a foreign jurisdiction for such acts would be a direct assault upon the sovereignty and independence of his country. * * * The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done and protects the individual who did them because they emanated from a foreign and friendly government."

The law officers of the United States have uniformly advised the executive department that individuals are not answerable in foreign tribunals for acts done in their own country in behalf of their government by virtue of their official authority.

In 1794, one Collet, lately the French Governor of Guadaloupe, was arrested in this country in an action brought against him for the seizure and condemnation of a vessel. The matter having been brought to the attention of our Government, it was referred to the Attorney-General, and he advised that the defendant, being subject to process, the Government could not then intervene, but added his opinion that if the seizure of the vessel were admitted to have been an official act done by the defendant by virtue or under color of the powers vested in him as governor, it would of itself be a sufficient answer to the plaintiff's action, and that

the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers, and that the extent of his authority could with propriety or convenience be determined only by the constituted authorities of his own nation." 1 Op. Atty.-Gen. 45–46. In 1797, in the case of Sinclair, the Attorney-General expressed the opinion "that a person acting under a commission from the sovereign of a foreign State is not amenable for what he does, in pursuance of his commission, to any tribunal of the United States." 1 Op. Atty.-Gen., 81. In 1871 the Attorney-General advised the Secretary of State as follows: "It has often been laid down that before a citizen of one country is entitled to the aid of his government, in obtaining redress for wrongs done him by another government, he must have sought redress in vain from the tribunals of the offending power. The object of this rule plainly is to give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid all occasion for international discussion." In 1872, in the case of the steamer *Tipitapa*, the Attorney-General advised the Secretary of State in a case where an officer of a party of armed men, acting under an order of the judicial officer of the port of Granada, had seized an American vessel at that port, the seizure having been made for the purpose of enforcing a supposed legal right, "that the government ought not to make reclamation in behalf of the owner, as it is presumable that if the proceedings were illegal the judicial tribunals of Nicauraugua would afford redress."

Conspicuous amongst the acts which are sheltered by this principle of international law are those of military officers in command of the armed forces of the State. According to one of the most recent commentators upon international law (Hall, Section 102), officers in command of armed forces of the State, and their subordinates and soldiers, are not in any case amenable to the civil or criminal

laws of a foreign State, in respect to acts done in their capacity as agents, for which they would be punishable or civilly responsible if done in their private capacity. This doctrine was sanctioned by our own Government in 1841, in the case of McLeod, who was under indictment for murder in a State Court of New York. He had been engaged as a member of the colonial forces in repelling an attack made upon Canada by an armed force from the United States, and had assisted in the destruction of a vessel moored on the American shore of the Niagara River, during which an American citizen was killed. The British Government, through its minister at Washington, demanded his release upon the ground that the destruction of the vessel was a public act, of persons in her Majesty's service, obeying order of the superior authorities, and, therefore, according to the usages of nations, could only be the subject of discussion between the two Governments. Mr. Webster, then Secretary of State, acceded to this view, stating that, "the Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorized by the British authorities, the individuals concerned in it ought not, by the principles of public law and the general usage of civilized States, to be holden personally responsible in the ordinary tribunals of law for their participation in it." The Courts of New York refused to release McLeod at the intervention of the general Government, and he was tried, but acquitted on proof of an alibi. The episode led to the enactment, by Congress in 1842, of the provision, now Section 753, United States Revised Statutes, by which the courts of the United States are authorized to issue a writ of *habeas corpus*, "where a person, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted, under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any

foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations."

Upon principle it cannot be important whether the acts of military authorities, when called in question, are done by the authority of a *de jure* or *titular*, or of a *de facto* Government. In either case, if they are done in the legitimate exercise of belligerent powers, they are not ordinarily attended with civil responsibility. This principle has been recognized by the Supreme Court of the United States in cases in which the civil liability of Confederate soldiers, for acts done as members of the insurgent forces, during the rebellion, was under consideration. Ford *v.* Surget (97 U. S., 594); Freeland *v.* Williams (131 U. S., 405).

As was decided in Williams *v.* Bruffy (96 U. S., 176), the Government of the Confederate States was a *de facto* government of an inferior class. "It never represented a nation; it never expelled the public authorities from the country; it never entered into any treaties, nor was it ever recognized as a government by an independent power."

Ford *v.* Surget was an action brought by the plaintiff to recover the value of certain cotton destroyed during the war of the rebellion in the State of Mississippi; and the Court held that the defense that it was destroyed by the defendant, acting under the orders of the military authorities of the Confederate States, was a good justification. Freeland *v.* Williams was a bill in equity to invalidate a judgment of the court of the State of West Virginia obtained against the defendant for a *tort* committed by him as a soldier of the Confederate army. One of the questions discussed was whether the judgment was void, inasmuch as it proceeded upon the grounds that the defendant was civilly responsible as a trespasser for an act done by him as a Confederate soldier in accordance with the usages of civilized war. In the prevailing opinion the Court said: "The case as presented to us shows

that the trespass for which the original judgment was rendered was of that character, and it is argued with much force that the court which rendered that judgment had no jurisdiction in the case, or, at all events, had no jurisdiction to render such a judgment, and that it is therefore void. It follows, from this view of the subject, that the court in which it was originally rendered had jurisdiction to set aside or annul it without the aid of the constitutional provision of the State of Virginia, and that on that ground alone the decree we are called upon to review must be affirmed. In this view of the subject some of the judges of this court concur." Again the Court say: "If it be true that, when the original action was presented to the Circuit Court of Preston County, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further, and its subsequent proceedings may be held to have been without authority of law. While it is not necessary to hold that the judgment, as presented by the record, is absolutely void, it may be conceded that a court of equity, in a proper case, can prevent the enforcement of it." In a dissenting opinion Mr. Justice Harlan insisted that the judgment was not void, but conceded that the complainant was not civilly responsible if his act was one of legitimate warfare as a soldier in the Confederate army.

The acts of the defendant as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround them if they had been performed subsequently. The organization of which he was a part, represented that kind of a *de facto* government which is described in Williams *v.* Bruffy,

"such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizen or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation." By its success the revolutionary party vindicated its claim to recognition as the legitimate government of Venezuela, and achieved a justification in the estimation of foreign governments and their legal tribunals for the acts of its military forces as complete and ample as though those forces had been employed by any sovereign power. After the recognition of the new government by the United States, the courts of this country must accord to those who, throughout the progress of the civil war, acted as the agents of the people of Venezuela, the position of official representatives of the state. The act of recognition by our Government neither added to, nor detracted from, the responsibility of the people of Venezuela for any prior injuries which citizens of the United States may have suffered on her soil from the hands of her *de facto* authorities; but these responsibilities, in our judgment, are to be adjudicated by the two governments by international action, according to the principles of international law applicable to such cases.

For these reasons we conclude that the acts of the defendant were the acts of the Government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.

The various requests made to the court on behalf of the plaintiff for instructions to the jury, either

involve propositions of law, which, according to the views we have expressed, were properly refused, or propositions for the submission of questions of fact, as to which there was no conflict of evidence, and which, therefore, the Trial Judge was not required to submit to the jury. If the Trial Judge, in directing a verdict for the defendant, enunciated a rule which, to its full extent, may not obtain, because it implies that the defendant would not be civilly responsible, even in a court of Venezuela, for any act done by him as a military commander, his disposition of the case was nevertheless proper, and the result is not affected by his expression of an erroneous opinion.

The judgment is affirmed.

Supreme Court of the United States

IN THE MATTER

OF

THE PETITION OF GEORGE F. UNDERHILL, FOR A WRIT OF CERTIORARI, &C., TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

SALTER S. CLARK,
Of Counsel.

Supreme Court of the United States.

In the matter of the petition of George F. Underhill for Writ of Certiorari, &c., in the case of

GEORGE F. UNDERHILL,
Plaintiff,
against
JOSE MANUEL HERNANDEZ,
Defendant.

BRIEF FOR PETITIONER.

Point I.

The case involves important principles of International Law.

The plaintiff, an American citizen, is suing civilly for torts alleged to have been committed against him by the defendant in Bolivar, Venezuela. Upon the trial before a jury the Court directed a verdict against plaintiff after the presentation of his evidence; and that judgment has been affirmed by the Circuit Court of Appeals. The acts complained of were committed during the progress of the

revolutionary troubles of Venezuela of 1892; and were all committed prior to any recognition by the United States Government, or by any government, of the Revolutionary Party in Venezuela, either as the sovereign authority there, or as having belligerent rights. The decision of the Circuit Court of Appeals, denying the right of action, is based upon the ground that the final success of the Revolutionary Party had a retroactive effect to legalize all the acts of the Revolutionists, without reference to any recognition of belligerent rights by this country; that, therefore, the acts of the defendant were done under color of sovereign right; and that the private party, though injured thereby, had no right of action therefor in the courts of a foreign country; and that his remedy, if any, was confined to the courts of Venezuela, or the channels of diplomacy.

The main facts of the case are set out in the petition, with references to the record, and therefore need not be rehearsed here. The opinion of the Circuit Court of Appeals is annexed to the petition.

Among the questions involved are:

(1). The status of an American citizen living in a South American State during one of its oft-recurring revolutions. If an insurrectionary leader there (either adventurer or patriot) captures the town, what authority does that give him over the inhabitants? Must the American citizen take the chances of which side is going to succeed?

(2). If the insurrectionary leader commits tortious acts against the American citizen—acts in no way justified by International Law or the rights of war—has the citizen any remedy in court?

(3). If so, does his remedy lie in the courts of that country, or the courts of his own country, or both?

(4). Can the courts of our country recognize the existence of a civil war in a foreign country prior to its recognition by the Executive Department of our Government? Have they jurisdiction to say whether an armed conflict in a foreign country is a civil war or an insurrection?

(5). Does the success of a revolutionary movement justify retroactively, legally, in the courts of all nations, all prior acts of the revolutionists?

(6). Has the recognition of a new government by the Executive Department any retroactive effect, so as to necessarily place all its acts prior to recognition uuder the protection of belligerent rights? In other words, is it not in the power of a government to recognize the result of a revolution without approving the methods that brought it about?

(7). Can a defendant escape civil liability, at least in the courts of a foreign country, by simply *claiming* to have done his misdeeds as a part of a revolutionary movement?

(8). Where is the line to be drawn between the adventurer acting independently and the soldier or general acting as part of an organized revolutionary movement—that is, between the plunderer and the man making legitimate war?

(9). Does the political character of the defendant's act save him from suit in a foreign court?

Point II.

There is a conflict of authority upon the point involved between different circuit courts of appeal.

The point involved is, that the success of a revo-

lution, and recognition of the new government, have a retroactive effect to make the successful party sovereign from the beginning, and justify all its prior acts, irrespective of any recognition of belligerent rights. The decision in this case of the Circuit Court of Appeals involves two points: (1). That the acts of a foreign sovereign or his agents, acting under clear sovereign rights, cannot be questioned in a foreign tribunal; and (2). That the success and final recognition of the revolutionary party legalizes its prior acts irrespective of any recognition of belligerent rights. The able opinion of the Court below is directed almost wholly to the first point, and, no doubt, that is law. The second point is also necessary to the decision, but I contend is not law. It is expressed (near the end of the decision) in the following language:

> "The acts of the defendant as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround them if they had been performed subsequently."

The cases particularly in conflict with this Court upon this point are:

> The *Itata*, 56 Fed. Rep., 505 (Ninth Circuit, 1893);
> U. S. *v.* Trumbull, 48 Fed. Rep., 99;
> *Ambrose Light*, 25 Fed. Rep., 408.

The *Itata* case was that of a vessel belonging to the Congressional Party of Chile, which was seized here as violating our neutrality laws. The case was decided upon the ground that what the vessel did would not have been a violation of our neutrality laws in any case; but upon the question as to whether the Congressional Party of Chile was at that time a sovereign state, although it afterward succeeded, and was recognized by the United States, The Court held:

> "The law is well settled that it is the duty of the courts to regard the status of the Congressional Party in the same light as they were regarded by the executive department of the United States *at the time the alleged offenses were committed* (quoting cases). It being admitted that the Government of the United States, at the time of the commission of the alleged unlawful acts, did not recognize the Congressional Party as being entitled to any belligerent rights, it would seem to follow that it was within the power of the Government at its option to treat the party as pirates if the facts warranted and justice and policy so required."

In the Trumbull case, which was the *Itata* case in the court below, the decision says:

> "It is beyond question that the status of the people composing the Congressional Party *at the time of the alleged offense*, is to be regarded by the Court as it was then regarded by the political or executive department of the United States. This doctrine is firmly established" (quoting cases).

In the *Ambrose Light* case, the vessel had been commissioned by some insurgents operating against the United States of Colombia, and had been captured as a pirate by some Americans and brought into an American port for condemnation. The Court held that there had been recognition, by our Government, of belligerent rights in the insurgents at the time of the capture, and that that was the only thing that saved the vessel from liability as a pirate. The Court says:

> "The liability of the vessel to seizure as piratical turns wholly upon the question whether the insurgents had or had not obtained any *previous* recognition of belligerent rights. * * * Private warfare is unlawful. International law has no place for rebellion, and insurgents have strictly no legal rights as against other nations until recognition of belligerent rights is accorded them."

(The Court then refers to the rule that such recognition belongs to the executive, and not the judicial, department.)

I cite the *Ambrose Light* case, though it was decided in the District Court, because it contains so full and able a discussion of the principles and of the authorities, and because it is adopted as authority by the Circuit Court of Appeals in the *Itata* case.

The proposition that it is for the executive, and not the judicial, department to inquire and decide whether civil war exists in a foreign country, and whether revolutionists have belligerent rights, was long ago established by this court, and the cases make no distinction between success and non-success.

Rose *v.* Himely, 4 Cranch., 241;
U. S. *v.* Palmer, 3 Wheat., 601;
Gelston *v.* Hoyt, 3 Wheat. ,246;
Gelston *v.* Hoyt, 13 Johns., 561;
Kennett *v.* Chambers, 14 How., 38;
Freeland *v.* Williams, 131 U. S., 405.

In Kennett *v.* Chambers (quoted above), a contract, attempted to be made between a citizen of the United States and an inhabitant of Texas, was held void because Texas was at that time in revolt against Mexico, and the Court held that the subsequent acknowledgment of the independence of Texas did not affect the question.

Point III.

Recognition of the existence of a new State is not equivalent to a recognition of its having had belligerent rights during the struggle for its establishment.

It may be that a foreign State can, by definite

action, recognize retroactively belligerent rights so as to cover all the prior acts of the successful party. But the United States did not do so in this case. It merely recognized the existence of the new State when it was established.

The opinion herein states:

> "After the recognition of the new government by the United States, the courts of this country must accord to those who, throughout the progress of the Civil War, acted as the agents of the people of Venezuela, the position of official representatives of the State."

I submit that the distinction between recognition of a new State and recognition of belligerent rights has been overlooked here. In modern wars foreign States have been quick, in cases of civil war, to recognize belligerent rights. In our own Civil War the great nations of the world had done so within a month of the firing upon Sumter.

But with uncivilized and half civilized nations all around us, cases may well arise where we may think it policy to recognize a new State as an accomplished fact, after it has been accomplished, and yet withhold our recognition of any belligerent rights on the part of the party that succeeded. To recognize new States tends to the peace of nations; to recognize belligerent rights, is a license to make war. We might well recognize as *de facto* ruler some Haytian or Russian or Chinese usurper, and yet preserve to our courts their jurisdiction to judge upon the private wrongs committed by his agents in accomplishing his nefarious purposes.

When a people, or a part thereof, revolt from their constituted authorities, they will, of course, if they succeed, justify to themselves, in their own courts, all the acts of their own party; but it is another thing altogether to ask the world to approve. Are we, a Christian nation, to be compelled to justify all the acts of South American or West

Indian adventurers, black or white, because they have had the good fortune to succeed and make themselves supreme for a short year or two? The promulgation of such a rule would encourage, not check, the tendency to revolution so prevalent there. And to say that the citizen still has his remedy in the native courts, or by diplomacy, is illogical; for if the successful revolutionist, prior to success, represents the sovereignty of his nation, then he will have the right to make war and the private party will have suffered no wrong.

If recognition of a new State carries with it a recognition of prior belligerent rights, then all the acts of the other party, the party rebelled against, are without legality. The result is, upon that theory, that if a suit is brought in our courts, prior to success, one party are pirates, robbers and murderers; but if, upon the same state of facts, suit is brought after success, the other party are all pirates, robbers and murderers. What are we to do with a judgment obtained or paid prior to success, where the party afterwards succeeds?

The decision of the Court below here makes a revolutionary party to have been sovereign from the beginning of the struggle; and yet, during all that time, there will have been another party indisputably sovereign at the time and treated as such by our own Government and in our courts.

Let the revolutionist understand that he is acting wholly without right until he can obtain some recognition of belligerent rights. Let him know that if caught in a foreign country, although he cannot be punished as a criminal, yet the courts of the foreign country will hold him responsible civilly to private parties. This will teach him to be slow to rush to arms against his constituted government. And if in any case he is held liable where his party shall have succeeded, or shall thereafter succeed, it is always in the power of his government

to reimburse him, as Gen. Jackson was reimbursed for the fine he had to pay at New Orleans for having overstepped the bounds of legal right.

The case of Williams *v.* Bruffy, 96 U. S., 176, is referred to in the Court below as supporting the theory that success of a revolutionary party justifies its prior acts. It does not go so far. The question there was whether a legislative act of the Confederate Congress confiscating certain debts due Northerners was valid. The Court held that although the United States had recognized belligerent rights in the Confederacy, yet the Confederacy was not a *de facto* government and its acts of legislation were not valid. It was only with reference to such *de facto* governments as that of Cromwell in England and the State Governments during our revolution, that the Court said (*obiter*) that their acts, from the commencement, would have been upheld as those of an independent nation. Yet the Confederacy had a government and exclusive authority over certain sections, which the revolutionary party of Venezuela never had until it was recognized by the United States.

Point IV.

The defendant was not acting as a part of an organized revolutionary army. but was acting independently.

There was no proof in the case that he had a commission from Crespo; or that there was any organized revolutionary army as a unit; or that he was acting in subordination to any general system. Crespo was recognized by our Government, not Hernandez.

But this point it would probably be more appropriate to urge, if the certiorari be granted.

Point V.

There should be a certiorari to the United States Circuit Court of Appeals for the Second Circuit, to bring this case before the Supreme Court.

Respectfully submitted,

SALTER S. CLARK,
Of Counsel.

No. 238. 36

SUPREME COURT OF THE UNITED STATES.

Brief of Logan & Demond for P. E.

OCTOBER TERM, 1896.

No. 238.

Filed Mar. 23, 1897.

GEORGE F. UNDERHILL,

Plaintiff-in-Error,

vs.

JOSÉ MANUEL HERNANDEZ,

Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

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WALTER S. LOGAN,
CHARLES M. DEMOND,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1896.—No. 238.

GEORGE F. UNDERHILL,
Plaintiff-in-Error,

vs.

JOSÉ MANUEL HERNANDEZ,
Defendant-in-Error.

Brief for
Plaintiff-in-Error.

History of the Case.

This case comes up on a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit, which latter court, upon a Writ of Error, had affirmed a judgment entered upon the direction of a verdict for the defendant at the close of the plaintiff's case.

The action was begun in November, 1893, in the Supreme Court of the State of New York, and thereafter removed on defendant's application to the United States Circuit Court for the Eastern District of New York. It was tried before Judge Hoyt H. Wheeler on March 27, 1894, who directed a verdict for the defendant at the close of the plaintiff's case (fol. 27). A Bill of Exceptions, containing all the evidence, was made (fols. 29–136); an Assignment of Errors was made and filed (fols. 136–140), and a Writ of Error was sued out from the Circuit Court of Appeals for the Second Circuit by the plaintiff, with a supersedeas in June, 1894 (fol. 144). The Circuit Court of Appeals, in December, 1894, affirmed the judgment in an opinion written by Mr. Justice Wallace (fol. 146), and a Mandate of Affirmance was ordered to be issued in January, 1895 (fol. 159). On application to this Court, a Writ of Certiorari was issued March 20, 1895 (fol. 163).

The Issues.

The complaint (fols. 3 and 4) alleges:

"I. That on the 13th day of August, 1892, at the city of Bolivar, in the Republic of Venezuela, South America, the defendant falsely, maliciously, without right or color of right, and wholly without reasonable cause or any provocation whatsoever, imprisoned the plaintiff in a certain house, namely, in the house which the plaintiff had theretofore occupied, and kept him so imprisoned up to October 18, 1892.

II. That frequently during said time the plaintiff demanded of the defendant that he, the plaintiff, be allowed to leave the city of Bolivar, but that the defendant refused.

III. That during said time the defendant also assaulted and beat the plaintiff by putting armed persons around the said house, by placing cannon around it, by depriving the plaintiff of wood and food and other necessaries of life, and by various other actions and words threatened the life and bodily security of the plaintiff.

IV. That, in consequence of such false imprisonment and assaults and threats, the plaintiff was prevented from attending to his necessary affairs and business during that time, and was made sick; and that during said time for about three weeks he lay seriously ill, part of the time in imminent danger of dying therefrom.

V. That the plaintiff has been damaged thereby in the sum of twenty-five thousand dollars ($25,000), reckoning solely the injuries to his person, and exclusive of the loss of property which the plaintiff was compelled to surrender under duress."

The answer (fol. 22) denies as follows:

"I. He denies each and every allegation in the said complaint contained.

II. For a further and separate defense, the defendant says that whatever was in fact done or authorized by him in or about the matters or events to which, as

he is informed and believes, the allegations of the complaint refer, was so done or authorized by him in his official capacity as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar, in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise."

The two issues raised by the pleadings were, therefore:

1. Did the defendant imprison and assault the plaintiff, or cause him to be imprisoned and assaulted, as in the complaint alleged?

2. Were the acts

"so done and authorized by him (the defendant) in his official capacity as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar in the lawful and proper exercise and discharge of his duty and authority as such official and not otherwise?"

Upon the first issue the plaintiff had the burden of proof; upon the second, the defendant.

There is no substantial contention in the case that the plaintiff did not prove the allegations of imprisonment and assault. The only question in the case is whether there was such proof of the official character of the defendant "as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar" as justified the learned Judge who presided at the trial in taking the case from the jury and instructing a verdict for the defendant.

We contend that there was not and that the Court's instruction to the jury to find a verdict for the defendant upon that ground was error for which the judgment should be reversed.

Facts as Shown by the Testimony.

(1) *The Witnesses.*

The Court directed a verdict at the close of our testimony. The case stands, therefore, upon the story of the plaintiff, corroborated in its substantial particulars by our other witnesses. The defendant himself was not called as a witness, although present in Court during the trial. The plaintiff had lived for a time in the City of Bolivar and knew what was going on there, but he was a foreigner, substantially a stranger to the language, the customs and the institutions of Venezuela, did not read the newspapers of the country or keep himself in touch with current political events (fols. 95–98). He did not, therefore, have any information which can be dignified with the name of knowledge as to what was going on outside of that city and could give no evidence of value upon that subject.

(2) *The plaintiff, his residence and business in Venezuela.*

George F. Underhill, the plaintiff, is a citizen of the United States. He was living in the town or city of Bolivar, Venezuela, in the year 1892. Bolivar is a small place of some ten or fifteen thousand inhabitants situated on the bank of their great river, the Orinoco, about four hundred miles from its mouth. Under a contract with the government (fol. 62) he had constructed a waterworks system for the place consisting of pumps, water mains, etc., and in 1892 was engaged in the business of supplying water to the town. It had cost him $75,000 to $100,000 (fol. 112), and he was the sole owner of it. In connection therewith he also carried on a machinery repair shop (fol. 65). For several years he had also been United States Consul, but was not such at the time of these occurrences (fol. 7). He owned a large house, granted to him as a part of the water-works concession (fols. 81 and 62), and occupied it with his wife and servants solely as a resi-

dence (fols. 65 and 113). This house, as the photographs show, was built in the style of the country, all upon one floor, with a courtyard inside, the rooms and various outbuildings surrounding the courtyard.

(3) *The plaintiff's proposed change of residence to Trinidad.*

As early as January, 1891, Mr. and Mrs. Underhill had contemplated making their home at Trinidad, an island belonging to England, situated off the coast near to the mouth of the Orinoco (fol. 67). In February, 1892, they had hired a house in Trinidad (fols. 68 and 113), and in March they had gone down there with furniture, household goods and servants and established themselves (fols. 68, 114, 120). Mrs. Underhill remained in Trinidad three months, from March until June, returning then to Bolivar because she had not heard from her husband and feared that some harm had come to him on account of the political disturbances (fols. 68, 114, 72). Mr. Underhill had returned to Bolivar in March to look after his business (fols. 68 and 114). Trinidad was to be the permanent home—the domicile—although they still retained the residence at Bolivar and lived in it when there (fols. 67, 114, 102).

(4) *The inundation of the Orinoco River, which caused the temporary closing of the plaintiff's system of water-works.*

During that Spring and Summer the annual inundation of the Orinoco River occurred, and the river rose higher than it had ever been before (fol. 68). When Underhill returned from Trinidad the last of March it was rising, and on July 14, 1892, it had risen so high as to cover the pump-works and stop all operations (fol. 68). It continued to rise after that during August and September, and then gradually receded, leaving all the machinery clogged with thirty inches of mud (fol. 79). The cleaning up could not

have been commenced before October, and it would have taken two or three months to clean up and start the system again (fol. 90).

(5) *The disturbances in Venezuela in 1892.*

During the Spring and Summer of 1892 the country was having revolutionary troubles. We have only the testimony of Mr. Underhill as to what these troubles were, and, as he was a foreigner and a stranger, he knew very little or nothing about them, except what he saw in the City of Bolivar. The defendant, a native and, as it is claimed, a revolutionist himself, who, it may be presumed, knew all that was to be known about the matter, neither testified nor introduced witnesses on his own behalf. We contented ourselves with proving the allegations of the complaint as to the imprisonment and assault of the plaintiff, and left the defendant to prove, if he could, the allegations of his second defense (fol. 22) that he was "the chief executive representative of the Venezuelan government in and about Ciudad Bolivar," and that what he did was done "in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise." The defendant did not prove—presumably because he could not—that he was the chief executive representative of the Venezuelan government, or that he had any connection with the Venezuelan government, or any power or authority from any one who could claim to be the government of Venezuela, and our grievance is that a verdict was directed against us, notwithstanding that we had proved the assault and imprisonment alleged in the complaint, and the defendant had failed to prove the allegation of his defense, that he was "the chief executive representative of the Venezuelan government." The testimony of the plaintiff did not prove this allegation of the defense, and could not have done it, for the plaintiff had no knowledge or means

of knowledge as to the authority of the defendant except simple hearsay. On cross-examination Mr. Underhill was questioned by Mr. Coudert about his understanding of the political questions in Venezuela, and he answered as best he could, but his testimony showed an entire absence of any accurate or substantial knowledge of anything which had been done or was going on in Venezuela outside of the City of Bolivar, in which he had lived. He had heard the questions spoken of, but had taken very little interest in the subject, and had not even hearsay information on the subject which was of any value.

He had heard of several groups of revolutionists which had been formed against the party or government in power, and who called themselves Crespistas, Gordos, Hernandists, etc. (fols. 84, 85 and 110), and that each of these revolutionary leaders was doing all he could for himself without much, if any, concerted action among them, and that Crespo was the one who finally succeeded (fol. 84) by capturing the capital, Caracas. But this did not occur until October 6, 1892, after most of the occurrences at Bolivar with which this suit is concerned (fol. 66). The new government under Crespo was not recognized by the United States until October 23, 1892, after the Underhills had both left Bolivar (fols. 60 and 61).

There is no evidence in the case anywhere that the defendant Hernandez ever held any commission or authority under any one vested or claiming to be vested with any governmental authority in Venezuela. If he held such commission or authority it was for him to produce or to prove it.

(6) *Events in the Town of Bolivar prior to the coming of the defendant.*

The inhabitants of the City of Bolivar generally seemed to be in sympathy with the revolutionists (fols. 93 and 128). Mr. Underhill, being, from his nationality and his

position, a somewhat prominent man in the town, was peculiarly exposed to suspicion both ways. The government had suspected him of sympathy with the revolutionists (fol. 110); the people (or some of them), of sympathy with the government (fol. 83). As a matter of fact he was very careful to maintain a strict neutrality (fols. 83 and 111–113). In June the Government had asked him to repair the steamer "Apure" (fol. 67), and he had refused lest it should seem like taking sides (fol. 110). Later they threatened him with arrest if he did not repair the "Nutrias" for the government (fol. 111), but even then he refused to do it except upon a written order from the company owning the vessel and upon payment by the company for the work (fol. 111). Afterwards, when he was in the power of Hernandez, he made the same condition as to repairing the "Socorro" for him (fol. 72).

(7) *Who the defendant Hernandez was. As a so-called revolutionist he acted on his own responsibility and only in the immediate neighborhood of the City of Bolivar. He does not appear to have had a commission or authority from any higher revolutionary body purporting to exercise general authority over the country or any larger portion of it than he himself occupied.*

He had got together in some way a small body of armed men in the immediate vicinity of the city of Bolivar and this body of men under his command resisted the constituted authorities of the government in this city. Early in the year 1892 he was a prisoner of the government at Bolivar (fol. 66), but being released or escaping, he went to raising troops for his alleged revolutionary purposes—that is, for the purpose of resisting the authorities of the government in Bolivar City (fol. 66). His troops consisted largely of Corsicans and Italians (fols. 71 and 81). There is no evidence that he had any com-

mission from Crespo or from any other revolutionary authority, or that he was working under their directions or with them in any way, or that there was any general plan of operations, military or otherwise, in the actions of the alleged revolutionists. So far as appears, in everything that occurred at Bolivar, Hernandez was acting with entire independence of any other alleged revolutionary power or authority. The only thing that does appear is that he was in revolt against the constituted authorities of the government in the city of Bolivar—that is, he was an insurgent or guerrilla or leader of a gang of bandits, whichever name we may think suits him best. Hernandez, with these followers, in August 1892, came to the City of Bolivar to attack it, or to offer resistance to the constituted authorities of the government there.

(8) *The encounter between the government troops and the followers of Hernandez.*

On August 7th, 8th and 9th, General Santos Carrera, the military commander for the government of Bolivar, went out with his troops against Hernandez (fol. 67). Carrera was at first victorious (fol. 96). The Hernandez people escaped across the river Ogaripa (fol. 108). Carrera, with two or three others, followed without their troops, and he was caught and slain (fols. 97 and 108). Some of his troops ran away (fol. 95) and some joined the followers of Hernandez (fols. 71 and 74). This was called the Battle of Buena Vista. The evidence does not show—because the plaintiff did not know and the defendant did not tell—how many persons there were on either side shooting at one another in this so-called battle or whether or not it is worthy of so dignified a name.

(9) *The City of Bolivar.*

Bolivar is a small city in one of the Districts of Guayana, in the State of Bolivar, which is one of the several states of the Republic of Venezuela (fols. 62, 66, 67, 96, 107 and

108). It is separated by a long strip of desert from the rest of the District of Guayana and State of Bolivar and from other parts of the Venezuelan nation (fols. 107 and 108). It occupies about the same relation to the Republic of Venezuela that San Antonio on the Rio Grande does to the United States; and if the capture by Hernandez of the City of Bolivar meant anything more than the temporary occupation by some of the Mexican revolutionists, who recruited their forces in Texas a few years ago, of one of the towns on our southern frontier would have meant, the defendant offered no evidence to prove that fact. It certainly meant much less than the holding of Paris by the Commune for 70 days in 1871.

(10) *The attempted escape of plaintiff and his wife and their arrest prior to the coming of the defendant Hernandez into Bolivar.*

On the 10th of August word of this so called battle came to Bolivar (fol. 67). There were several steamships then lying in the river off the town, the "Nutrias" and "Socorro," controlled by the government, and the "El Callao," an English vessel, commanded by Captain Wetherell (fol. 127). On the night of the 10th all or most of the government officials of the town took flight. Most of them were taken across the river by the "Nutrias" or "Socorro" (fol. 89), and about fifty or sixty took refuge on the "El Callao" (fols. 71 and 89). Mrs. Underhill's passage back to Trinidad had been previously taken on the "El Callao" (fol. 68), but the steamer was not yet unloaded and was not due to sail for some days (fol. 69); but Captain Wetherell, a friend of the Underhills, had sent for them to come aboard (fol. 69). On the morning of the 11th, about seven o'clock, Mr. and Mrs. Underhill left their house to go aboard the "El Callao," Mr. Underhill accompanying her, but not intending himself to go to Trinidad (fol. 83). They had not then heard of Hernandez's

so-called victory (fol. 69). On reaching the shore they found the ship's yawl to take them out to the steamer, it having been sent ashore for them by the officers of the "El Callao" (fols. 120 and 121). They had gotten into the small boat and were about to proceed to the ship when an armed mob, which had collected, forced them to disembark (fols. 103 and 119). They were taken to the Hotel Krone (fols. 72 and 104) and confined there a part of the day (fol. 104), and afterwards, during that day, Mr. Underhill was confined for a time in the jail (fols. 71, 83, 105 and 108). Some of the people, obeying the orders of Hernandez, had, on the morning of the 11th, come into town and acted for Hernandez until he came in himself on the 13th (fols. 83 and 89).

(11) *The entry of Hernandez into Bolivar and his assumption of authority.*

On the 13th of August, Hernandez entered the town at the head of what are called his soldiers—that is, the Corsicans and Italians that he had got together and the few of Carrera's troops that had joined them (fol. 71). Their clothes were new (fol. 71). They had new hats with white muslin bands around them, and on the muslin was printed, "Vive Hernandez," "We are the law." "Down with the Government," etc. (fol. 71). They had no distinctive uniform, so far as appears, unless these white bands around the hats with the discordant emblems printed on them constituted uniforms (fols. 71 and 120). Hernandez immediately took complete control of everything (fols. 84, 89 and 128); imprisoned those that remained of the old government officials (fol. 97); called himself "Civil and Military Chief" (fol. 78); took possession of the government's barracks for his soldiers (fol. 80 *et seq.*); captured the government's official stamp and used it on his letter-heads (fols. 78 and 88); and signed his letters as ruler there in the name of God and the

people, "Dios y Federacion" (fol. 88). From that time until October 18, 1892, when the plaintiff escaped or was allowed to depart, Hernandez was in physical control of the town and everybody was at his mercy.

There can be no question, and none is raised, but that Hernandez was responsible for all the indignities that were inflicted upon Underhill during this period, and that it was all done by his order and direction.

(12) *Hernandez was in control of a very insignificant portion of country, in fact, of but a small town.*

The authority of Hernandez, although physically absolute in Bolivar itself, did not extend beyond the town (fol. 96 *et seq.*). As matter of fact, there were practically no inhabitants outside of the town for many miles (fol. 95). The country is very sparsely settled (fols. 107 and 108)—nothing but a few mud huts here and there. All the rest of the Guayana District, a territory which, on the map, includes 30,000 square miles, was still under the control of the government (fol. 96). Caracas, the capital, was still in possession of the government.

If the defendant was, at any time during the period in which these outrages were inflicted upon Mr. Underhill, anything more than a successful bandit, with enough armed men obeying his orders to overawe for the time a little lonely city on the confines of the desert, he has utterly failed to show it by any evidence in the case.

(13) *Plaintiff's first interview with Hernandez and defendant's refusal to permit him to leave.*

On the 14th of August, Hernandez sent six or eight people—calling themselves a committee—to Underhill, who demanded that he should go to Hernandez's office, which they called "the commandancia," and then that he should go with Hernandez to examine the vessel called the "Socorro," which had been injured by the fleeing government officials (fol. 71). Underhill went under guard (fol.

72) to "the commandancia," saw Hernandez, and went with him and the others (fol. 72) to the vessel to examine it. He finally consented to repair it on the same terms on which he had repaired the "Nutrias" for the government (fol. 72).

Mr. Underhill, at this interview, asked Hernandez's permission to go to Trinidad, but Hernandez said he would not allow him to leave Bolivar (fol. 72).

(14) *Plaintiff's attempt to leave his house on August 15, 1892, and his imprisonment for two months by defendant's orders.*

On the 15th of August, Underhill attempted to leave his house to get fodder for his animals. He found armed men around his gate. They were Hernandez's soldiers with the white bands around their hats bearing the mottoes: "Vive Hernandez!" "We are the Law!" "Down with the Government!" etc. Attempting to walk down the street, he was stopped and told by them that it was Hernandez's orders that he and his wife were not to be allowed to leave the house (fols. 73 *et seq.*; 82, 114). For two months, namely, from August 15th to October 18th, he was imprisoned in that house (fol. 74). Hernandez's soldiers were stationed around it (fols. 74 and 115), some continually sitting on the stoop of his house (fols. 80, 115 and 123), right by the principal room of the house occupied as a bedroom by Mr. and Mrs. Underhill (fol. 115). They were stationed both at the front and back of the house (fols. 124 and 126).

Underhill sent frequent messages to Hernandez asking permission to leave Bolivar by every steamer that sailed (fols. 75 and 93), all of which requests were refused. Twice he went in person to Hernandez, once on September 14th and once some time in October, and demanded that he be allowed to leave, but Hernandez refused (fols. 75 and 76). Once, on September 26th, Mrs. Underhill

went in person to Hernandez and made the same demand for her husband and she was also refused (fol. 116). Mr. Underhill was not allowed to leave that house during these two months except on the two occasions when he went to see Hernandez, and once when he went down to the pump works (fol. 74). On all these occasions the guards around the house followed him where he went and brought him back to the house (fols. 75, 79, 116 and 118). Mr. and Mrs. Underhill did not go out of the house, because they knew they were prisoners. They were told so and they could see it for themselves (fol. 74).

(15) *The assaults committed and the indignities inflicted upon plaintiff by the defendant or by his orders.*

During all this time they were subjected to all sorts of indignities. They received frequent warnings from friends not to show themselves at the doors and windows, as their lives were in danger (fols. 76 and 116). Hernandez's soldiers were firing musketry towards the house all the time (fol. 76). They called Underhill contemptuous names, reviled him as a Yankee (fol. 76), and shouted contemptuously at the United States flag (fol. 76). Some time in August they brought a cannon up before the house and loaded it (fol. 75). Afterwards three more cannon were brought there (fols. 75 and 115). These four cannon remained there until after the Underhills left in October (fol. 75). They were placed there to threaten and annoy Mr. and Mrs. Underhill (fol. 80). All the witnesses concur that all the cannon were continually pointed toward the door and windows of the house (fols. 75, 80, 82, 118, 120, 123 and 126). Hernandez's office was only a block or two away and he passed the house himself nearly every day (fol. 74) and saw what his soldiers were doing, and the indignities they were inflicting upon Mr. and Mrs. Underhill.

At one time, Hernandez sent officers, demanding that

Underhill give up the house to be used as a barracks for his Winchester men (fols. 74 and 116). No other place was offered the Underhills to which they might go (fols. 74, 112 and 116). Hernandez demanded that Underhill repair his rifles (fol. 74). A valuable mule belonging to Underhill was demanded and finally forcibly taken from him, and then, after being kept for three days, was sent back just ready to die (fols. 116 *et seq.*). The steward of the "El Callao," coming to the house with provisions on two occasions, was refused admission by Hernandez's soldiers (fols. 119 *et seq.*) ; 120, 126). Their friends were ordered by these same soldiers not to go near them (fol. 99). Their food supply was cut off and they had to kill their goats to live on (fol. 99). They had to listen to foul language and abuse from Hernandez's followers all the time (fol. 99).

(16) *The defendant's first attempt to coerce the plaintiff into surrendering his system of water-works.*

On October 14th, Underhill, finding himself breaking down, felt that "he must get away or go mad" (fol. 98). He went to Hernandez personally to demand that he be released from his confinement. This was the first time he had left the house since August 15th (fols. 74 and 98). As he came out of the door, the soldiers demanded where he was going. He said to see the General. They allowed him to go, but followed him there and back (fol. 75). He demanded of Hernandez that he be allowed to leave Bolivar (fol. 97). Then Hernandez, for the first time, brought up the question of the water-works as a reason for detaining him. Hernandez said he had heard that Underhill was going to leave the country and abandon all his property there (fol. 97), and then told him that he was in Venezuela now, was a servant of the people and had no business to leave (fols. 98, 75), and that he, Hernandez, was going to hold him there until Underhill should get

some responsible merchant to become surety for his return (fol. 97), and that no American gunboat could take him away (fols. 75 and 98). Underhill assured him that he meant to return (fols. 98 and 112); that he could not be such a fool as to abandon all his property (fol. 112); that his assistant, Harold Jennings, a man of full age (fol. 98), who had managed the works for two years (fol. 98), was going to stay and clean them up, and that he was perfectly competent to do so. All this was without effect upon Hernandez.

The anxiety and uncertainty as to his ultimate fate finally produced brain fever, with which Mr. Underhill was sick for three weeks and in danger of death (fols. 76 and 118).

(17) *The second attempt of defendant to coerce the plaintiff with respect to giving up his system of waterworks.*

On September 23d, while Underhill was sick, Hernandez wrote to him, demanding that in eight days he start pumping. Hernandez said that the cause of stoppage no longer existed (fol. 78). This was not true (fol. 79). At that time part of the pumping plant was still under water (fol. 79). The boilers were still wet (fols. 79, 80 and 90), and everything was covered with thirty inches of mud (fol. 79). A steamer (the "Nutrias"), had run into the boiler-house and partly demolished it (fols. 79 and 93). Parts of the machinery had been stolen (fols. 79 and 80). The inundation was still so high that they could not have begun to clean up for ten days from that time (fol. 79), and it would have taken two or three months after they began to finish the cleaning up and start pumping (fols. 79 and 90).

In answer to Hernandez's letter of September 23d, Underhill wrote a letter to Hernandez on the 24th (fol. 91), in which he complained bitterly of the treatment he

had received at the hands of the mob in August and the insults he had since received and of Hernandez's refusal to allow him to go. In that letter he used the phrase, "I shall never run the aqueduct for the city of Bolivar again." Whatever he meant by this at the time, he had an interview with Hernandez afterward in which he said plainly and emphatically that he had no intention of giving up the business (fol. 76), and meant to run it either by himself or through others as soon as he could clean up (fol. 90). "I never at any time expressed an intention to the defendant, General Hernandez, to abandon my business of the water-works" (fol. 112).

(18) *The continuance of the imprisonment and other oppressive acts of defendant.*

Some time after September 24th and after Underhill's illness—the exact time does not clearly appear—Underhill went again to Hernandez to demand that he be allowed to leave Bolivar (fols. 76 and 92), and the reason assigned by Hernandez for not allowing him to go then was that Underhill had insulted Hernandez by his letter of the 24th—Hernandez seems strangely susceptible to insults—and must stay and answer to a court-martial for it (fols. 92 and 99). The reason assigned by Hernandez for not allowing Mrs. Underhill to go was that it was unsafe for ladies to travel (fols. 77 and 99). But other ladies were travelling (fol. 99), and it is difficult to imagine any dangers of travel which could be more to be dreaded than the dangers attendant upon staying in Bolivar while Hernandez and his followers had physical control of the town.

On September 30th (fol. 101), while Underhill was sick in bed (fol. 99), some young men (fol. 112) whom Hernandez had assumed to appoint as civil judges there, came to Underhill's house, forced themselves in (fols. 100 and 101) and forcibly took his statement about what had happened with reference to the mob on August 11th (fol.

100 *et seq.*) in order to get him to exonerate the defendant from blame in that transaction (fol. 101).

(19) *The motive of defendant all through was to coerce plaintiff into selling or giving up his system of water-works.*

On October 2d, Mrs. Underhill was allowed to leave town (fol. 115). Then came demands from Hernandez that Underhill sell the water-works business (fol. 80). Hernandez had before that threatened to break the contract (fol. 93). Underhill was then allowed to depart on October 18th (fol. 80).

We offered in evidence this contract under which Mr. Underhill was running these Bolivar water-works, but the defendant objected to the evidence "as irrelevant and immaterial and as having no bearing upon this case," and the evidence was ruled out against our objection and exception (fols. 61–64). Our object in offering the evidence was to show that Mr. Underhill had entirely fulfilled all the duties and obligations he undertook under and by virtue of that contract, and that he was liable to no imputation of blame in the premises (fol. 62). The evidence having been rejected upon the defendant's motion, he certainly cannot now, after preventing us from proving that we were free from blame in connection with the water-works business, justify his own action by imputing to us any such blame.

(20) *The condition of civil and military affairs in Bolivar and in Venezuela during the times in question.*

The city of Bolivar, during this time, was completely in the possession and under the physical control of Hernandez (fol. 106). People were, however—except Mr. and Mrs. Underhill—allowed to come and go as they pleased through the town (fol. 106). People were—except Mr. and Mrs. Underhill—coming and going as they pleased on every vessel (fol. 106). Mr. and Mrs. Under-

hill were the only prisoners and Underhill's was the only house which had cannon pointed at its doors and windows and soldiers stationed there to prevent ingress or egress.

Neither Crespo nor Hernandez nor any revolutionary party or faction was ever recognized by the United States Government or by any foreign government as having belligerent rights during the struggle. The government of Venezuela did not recognize the revolutionists or any party or faction of them as having belligerent rights. The number of soldiers in the field is not shown nor is it shown that there was any general organization, civil or military, with any responsible head among the revolutionists. Hernandez is not shown to have had any connection with, or authority from, anybody. The regular government had, however, full diplomatic relations with the United States, Mr. Scruggs being our minister to Venezuela at that time (fol. 100).

The only recognition by the United States Government of any of the revolutionists was on October 23, 1892, after Crespo had entered Caracas and when he had organized there a new government with himself as president (fol. 60). This was after Underhill's departure from Bolivar.

(21) *The Constitution and Civil Law of Venezuela during the times in question.*

The civil law of Venezuela existing at that time, both under the Constitution and Civil Code, which are in evidence, gave to a person injured a right of action for violence against the person substantially like our cause of action for false imprisonment and assault and battery (folios 30, 33, 34, 38 and 39).

International law is made by the Constitution of Venezuela a part of the municipal law, and the Constitution gives it special application to the case of civil war, and also particularly provides that in civil war the humanitarian customs of Christian and civilized nations shall be observed (Art. 117, folio 59).

SPECIFICATION OF ERRORS.

I.

The Court erred in directing a verdict for the defendant.

There was error on the following grounds:

(1) To claim the rights of war in any event, the burden was on the defendant to show that civil war existed, and that he was a member of a regularly organized revolutionary army and duly commissioned from some central authority and not acting independently. The defendant failed to produce any evidence of this character, and none such can be gathered from the plaintiff's evidence. This subject should have been left to the jury.

(2) In the absence of recognition by the United States Government of a state of civil war as existing at the time in question, the courts of this country must consider the former state of things as existing. Hernandez was, therefore, acting solely in a private capacity without the rights of war, and he is liable for all his acts as a private individual.

(3) Even if the defendant had been in a position to claim the rights of war or to rule under martial law, the rules of war under international law did not give him the right to act maliciously or wantonly. Actions for false imprisonment and assault and battery are not local. If Hernandez exceeded his military rights, the civil courts of this country can try this question, and it was for the jury to say whether the acts of Hernandez were malicious or wanton.

These questions are all raised by our exception to the direction of a verdict (fol. 135); by our various requests to go to the jury (fols. 133 and 134), and by our Assignments of Error (fols. 136–139).

II.

The Court erred in rejecting the following evidence:

(1) The contract with the Government under which the plaintiff was carrying on his business, showing his ownership of the water-works and of the residence, and that he was under no liability to forfeiture of the same (fol. 63).

This question is raised by our exception to the rejection of the evidence (fol. 62) and by Assignment of Error I. (fol. 137).

(2) The evidence of the cost and value of the water-works to the plaintiff.

This is raised by our exception to the rejection of the evidence (fol. 64) and Assignment of Error II. (fol. 137).

(3) The evidence of the plaintiff's maltreatment by the mob on August 11th, his confinement in the Hotel Krone and afterwards in the jail, and Hernandez's connection with it all.

This is raised by our exception to the rejection of the evidence (fols. 71, 112, 113, 119, 127) and Assignments of Error III., IV. (fol. 137).

Ground of Judge Wheeler's Decision.

The decision of the Court at Circuit was based distinctly upon the sole ground that a party having soldiers who will obey him, and being *de facto* in power in a certain place, cannot be held to answer in a civil Court for anything he chooses to do.

The full discussion between counsel and the Court upon the motion for a direction of a verdict is given between fols. 128 and 135, but the following quotations show Judge Wheeler's position:

> "THE COURT: Then your case turns on whether you can maintain your action for keeping the plaintiff there, when what he did he did as such com-

mander-in-chief in control of military authorities, although it is not shown he was acting directly under the government" (fol. 131).

"THE COURT: That is your case—whether you can maintain an action against an officer who has got so far as to have an army under his command and in control of a place, civil and military, and tells a man that he must not go.

"MR. LOGAN: I think that is substantially it—whether we can maintain an action against a man who, without any authority of law, organizes—gets together armed men who will obey him, and drives out the previously constituted authorities, and assumes to be the dictator, king, president, congress, judge of all the courts and everything else.

"THE COURT: He has got following enough to have an army and take and maintain control.

"MR. LOGAN: He has got following enough to have the physical power—if he said that Mr. Underhill's head must come off, he could cut it off.

"THE COURT: If he said stay in, he must stay in.

"MR. LOGAN: Or if he said go out; if he wanted his mule, come and take it.

"THE COURT: If he said all the people should stay in their houses, they would have to stay.

"MR. LOGAN: I guess they would; there would be a lot of them get shot if they didn't.

"THE COURT: Can you cite me an authority where a civil action has been maintained against a person who had such military control?" (fol. 132)

In deciding the case the Court says:

"Well, now, I do not think the justification as commander-in-chief rests on recognition by our government, but rests on the fact of being in a state of war, military rule, the civil authorities suspended, and he was in command. That is the foundation of the plaintiff's case—that the defendant was in command, and what was done was done pursuant to his command as the supreme commander there. In such a case I do not understand there is a right of action;

> that is, a justification—that is, the civil law is suspended—that is, silent; the military law is in force; so, however unfortunate it may have been to the plaintiff, he has sued the defendant as a commander-in-chief of the forces for what, as such, he did to him, which, in my view, does not furnish any right of action whatever, any more than a Virginia farmer could have sued Gen. Beauregard for what they did at the Battle of Bull Run—tore up his grass and made mischief there" (fol. 134).

It follows from this position that Judge Wheeler considered as immaterial all questions as to the character of the acts done, whether they were appropriate acts of civilized warfare necessary for the general purpose of the war, or, on the other hand, were merely malicious and prompted by caprice or greed; all questions as to what such military commander represented, whether he was a military commander of the constituted government or of a revolutionary party, or a mere filibuster or bandit acting on his own motion and independent of any central authority; whether he had a commission or not; all questions as to the extent of territory occupied, the number of his followers and whether they were regularly uniformed soldiery or not; all questions as to whether the conflict had reached a point so as to be properly called a civil war or was a mere local insurrection; all questions as to whether belligerent rights or a state of war had been recognized in the combatants; all questions as to the rights of a neutral or a non-combatant citizen.

Upon the theory adopted, if we understand it aright, any leader of soldiers, anywhere, cannot be questioned in any court for any act whatsoever, whether the alleged revolution had succeeded or not, or whether this particular leader was connected with some central authority or was running a little private insurrection on his own account.

Does not this make all insurrections lawful and protect all insurgents of whatever nature or character—Jesse

James, in Missouri, the Chicago rioters and the Paris Commune, as well as General Beauregard at Bull Run, or George Washington in the American Revolution?

Our position is that to protect a defendant from liability to answer in civil courts for trespass that he may commit upon person or property something more must be shown than that—to use the language of Judge Wheeler—

> "he has got so far as to have an army under his command."

It must be further shown that that army represents a government and is entitled to wage war.

The Decision of the Circuit Court of Appeals.

An examination of the opinion of the Court, delivered by Mr. Justice Wallace, discloses that the learned Judge assumed that the defendant belonged to a revolutionary party and commanded some portion of its forces (fol. 149), although there was no proof of this in the case and although we most strenuously denied it. Mr. Justice Wallace held that the acts of the defendant were not malicious (fol. 150); but he did not consider the excluded evidence which would have tended to show malice nor did he pass upon the validity of the plaintiff's exceptions. It is assumed in the opinion all through that Hernandez stood in the capacity of a public agent (fol. 151), in the capacity of one representing and acting under instructions of a sovereign power and the cases cited are of this character.

Hernandez is likened to a military officer in command of the forces of a state (fol. 154).

As a matter of fact, the evidence discloses no connection whatever between Hernandez and any other revolutionary power or civil government. The defendant introduces no evidence to show any such connection and none appears anywhere in the case. The direction to find a verdict for

the defendant was given upon evidence which the presiding judge who gave the direction did not claim showed anything more than that the defendant was at the head of an army strong enough to "take and maintain control" of the little city of Bolivar for a few weeks' time.

The decision of the Circuit Court of Appeals was, therefore, based upon a misapprehension of the evidence as it appears in the record.

Synopsis of the Argument.

(1) Even if there had been a revolutionary party in Venezuela entitled to make war, and even if a state of war was existing, the burden was on the defendant to show that he belonged to such a revolutionary party by commission from some central power or authority and was not a mere freebooter or adventurer advancing simply his own interests. He does not show this and there is evidence to the contrary. It was certainly, in any event, a question for the jury.

(2) It is for the United States Government, not the Courts, to declare, if it be the fact, that the conflict in Venezuela in 1892, previous to October 23d, is entitled to the dignity of a civil war. It has never done so. Until it does so, the courts of the United States must look upon all the acts of the revolutionary party as without the sanction of the laws of war. It is a political question involving vastly greater matters than the liability of individuals in our courts. Recognition of belligerent rights may or may not have a retroactive effect; but the recognition of a new government does not retroactively recognize the existence of belligerent rights in any party. It may be wise to recognize a new government which has been established and refuse all recognition or justification to the methods by which it was established. In any event, this is a political and not a judicial matter. All this is settled by a long line of authorities in this country.

(3) This action was properly brought in New York, where the defendant was found. Such actions are not local. It could not be brought in any other place than New York, because the defendant was here and service on him was necessary to commence the suit. We could not sue him in Venezuela because we could get no jurisdiction of him there.

Furthermore, the Constitution and laws of Venezuela authorize such an action. Even if Hernandez was a military commander and entitled as such to the rights of war, he was still responsible for any acts which were merely malicious or tyrannical or unnecessary to the furtherance of the conflict. A military commander is personally responsible if he violates any of the rights of neutrals maliciously. The civil courts of this country can try such cases. The evidence disclosed that Underhill's detention was wholly unnecessary. He was a neutral and non-combatant and always maintained his neutrality. The various acts committed, commanded or authorized by the defendant and disclosed by the evidence, were unnecessary and malicious. Certainly, here was a question for the jury.

(4) The evidence as to the value of the water-works, which was rejected, was material as tending to show defendant's motive in his treatment of Underhill in connection with his demands that Underhill should sell his water-works, and his threats to forfeit them if he did not, and his refusal to allow him to leave Bolivar without giving security that he would come back and run the water-works. The contract under which Underhill was working and which was rejected when offered by us in evidence was material as showing that Hernandez, even if vested with supreme civil and military power, had no right to forfeit it or to declare it forfeited. The evidence of what happened on August 11th, in connection with the mob and Underhill's being thrown into jail, was material in connection with the evidence offered to connect Hernandez with such actions.

POINTS.

I.

Our evidence to sustain the plaintiff's cause of action for false imprisonment and assault and battery was abundantly sufficient to entitle us to go to the jury unless the defendant's alleged official capacity excused him from liability.

The motion for a direction of a verdict was made on the ground that "General Hernandez was the government *de facto* of that place" (fols. 128 and 129), and the Court, in granting the motion, did it exclusively upon the ground that the defendant was "commander-in-chief of soldiers," and not at all upon the ground that there was any defect in our proof of the imprisonment or assault and battery which was not claimed (fols. 130 and 131, 134 and 135). We have already referred to the testimony which shows abundantly that the plaintiff was kept a prisoner in his house for some two months and forcibly prevented from leaving the City of Bolivar, or going about from place to place within the city; that cannon were placed in front of his house pointing to his doors and windows to intimidate him; and that other acts of intimidation and assault and battery were repeatedly done to him during this period and that all this was done by the direction and command of the defendant (fols. 71–112, 114–118, 119–127, and 128).

II.

The action is not local and can be properly brought in any forum where jurisdiction can be obtained of the defendant, and it can be brought in no other forum.

If we could sue in a Venezuelan court, finding the de-

fendant in Venezuela, we can sue in a New York court, finding the defendant in New York.

> "It is well settled that common law torts may be redressed as well in courts of other states as in those of the state in which the wrong was committed." (Story on Conflict of Laws, page 844, Note A.)
>
> "In the common law, real and mixed actions are local, and personal actions are transitory.
>
> Considered in an international point of view, the jurisdiction, to be rightly exercised, must be founded either upon the person being within the territory or upon the thing being within the territory; for otherwise there can be no sovereignty exerted upon the known maxim '*extra territorium jus dicenti impune non paretur.*'" (*Id.*, page 754.)
>
> *Madrazo* v. *Willes*, 3 B. & Ald., 353;
>
> *Melan* v. *Duke de Fitz James*, 1 Bos. & Pull., 138;
>
> *Leonard* v. *Columbia Nav. Co.*, 84 N. Y., 48;
>
> *Whitford* v. *Panama Railroad Co.* 23 N. Y., 465;
>
> *McDonald* v. *Mallory*, 77 N. Y., 547;
>
> *Dennick* v. *Central Railway Company*, 103 U. S., 11.

III.

The burden of proof was on the defendant to show that he was "the chief executive representative of the Venezuelan Government in and about Ciudad Bolivar," as he alleges in his answer.

The complaint (fols. 3 and 4) alleges the ordinary cause of action for false imprisonment and assault and battery against the defendant. The answer (fol. 22) sets up two defenses:

1. A denial of the allegations of the complaint.

This put the burden of proof on us to show that the plaintiff was actually imprisoned and that the assaults were made upon him, as alleged in the complaint. We did this abundantly by the evidence which we introduced.

> 2. "For a further and separate defense, the defendant says that whatever was in fact done or authorized by him in or about the matters or events to which, as he is informed and believes, the allegations of the complaint refer, was so done or authorized by him in his official capacity *as the chief executive representative of the Venezuelan government in and about Ciudad Bolivar*, in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise."

This is an affirmative defense, and the burden to prove it rests upon the defendant.

> "Whenever, whether in plea or replication or rejoinder or surrejoinder, an issue of fact is rejected, then, whether the party claiming judgment asserts an affirmative or negative proposition, he must take the burden of proof." (Wharton on Evidence, Vol. 1, Section 354.)
>
> "If, to a tort, justification is set up by the defendant, the burden is on him to prove such justification." (*Id.*, Section 358.)
>
> "The burden upon the plaintiff is co-extensive only with the legal propositions upon which his case rests. It applies to every fact which is essential or necessarily involved in that proposition. It does not apply to *facts relied on in defense* to establish an independent proposition, however inconsistent it may be with that upon which the plaintiff's case rests. *It is for the defendant to furnish proof of such facts, and when he has done so* the burden is upon the plaintiff, not to disprove these particular facts nor the proposition which they tend to establish, but to maintain the proposition upon which his own case rests, notwithstanding such controlling testimony and upon the whole evidence in the case." (*Wilder* v. *Cowles*, 100 Mass., 486.)

When a fact is peculiarly within the knowledge of a party, the burden is on him to prove it.

1 Wharton on Evidence, 367.

1 Greenleaf on Evidence, 79.

> "In every case, the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant." (2 Am. & Eng. Enc. of Law, 656, Note.)

It is a well-established rule of evidence that the burden of proof is cast upon the defendant when a presumption of law arises in favor of the plaintiff.

1 Wharton on Evidence, Section 358.

Lilienthal's Tobacco v. *United States*, 97 U. S., 237.

In our case, after the plaintiff by his evidence established the wrongful acts complained of, a presumption of law arose in his favor that such acts were unlawful until proved otherwise, and the burden was shifted to the defendant to show their legality.

IV.

The English case of *Mostyn* v. *Fabrigas*, 1 Cowper, 161.

This case seems of sufficient importance to merit discussion under a separate point, although it is a direct authority to sustain each of the two preceding points.

It was an action of trespass brought in the Court of Common Pleas of England by Fabrigas against Mostyn, the Governor of Minorca, for assault and false imprisonment. It was argued before Lord Mansfield, having been appealed on exceptions taken to the ruling of the lower court.

The only possible distinctions that can be drawn between this case and ours are:

1. Minorca was an English province, while Venezuela is an independent nation.

But the English provinces were at that time, as now, judicially independent, and this case is decided by Lord Mansfield upon principles that would have applied just the same if Minorca had been an independent nation like Venezuela instead of a province.

2. It was in proof and conceded that the defendant was the legally appointed Governor of the Island of Minorca. In our case there is no proof, and we strenuously deny that Hernandez had any authority whatever from the Government of Venezuela or from any central governmental body, or even revolutionary authority.

In this respect our case is much stronger for the plaintiff than the case of *Mostyn* v. *Fabrigas*.

The injuries complained of in the two cases are very much alike. The charge in the English case was that:

> "The defendant, on the first of September, in the year 1771, with force and arms, etc., made an assault upon the said Antony at Minorca * * * and beat, wounded and illtreated him and then and there imprisoned him and kept and detained him in prison there for a long time, to wit, for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm and against the will of the said Antony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried and caused to be carried the said Antony from Minorca aforesaid to Carthagena in the dominions of the King of Spain," etc.

The defense was that the acts complained of were committed by the defendant as Governor of Minorca and that he was answerable for no injury whatever done by him in that capacity.

The defense was overruled and the jury rendered a verdict for the plaintiff for three thousand pounds damages. Upon the appeal the judgment was affirmed and Lord Mansfield, in his elaborate opinion, says:

> "Nothing is so clear as that, to an action of this kind, the defendant, if he has any justification, must plead it."

And again, speaking of the right of the defendant to justify:

> "If he has acted right, according to the authority with which he is invested, he must lay it before the Court by way of plea and the Court will exercise their judgment whether it is a sufficient justification or not. * * * I can conceive cases in time of war in which a Governor would be justified, though he acted very arbitrarily, in which he would not be justified in time of peace."

Again, speaking of locality of actions:

> "The place of transitory actions is never material except where, by particular act of parliament, it is made so. So all actions of a transitory nature that arise abroad may be laid as happening in an English county."
>
> "* * * As to transitory actions, there is not a color of doubt that every action that is transitory may be laid in any county in England though the matter arises beyond the seas."

This case is one of Smith's leading cases (Vol. 2, page 916), and some quotations from the American notes are interesting.

> "On the other hand, speaking generally, where the action is *in personam*, whether it is in respect of a contract or of a tort, our courts will, it is apprehended, entertain it though it may have arisen abroad and though the parties to it may be aliens, provided that service of process is effected according to their rules," citing Story's Conflict of Laws, 542, 543.

"As regards torts, there seems to be no reason why aliens should not sue in England for personal injuries done them by other aliens abroad when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which has prevailed to the contrary seems to be erroneous."

"Transitory actions are those in which the transaction is one that might have occurred in any place. * * * Personal actions, whether *ex contractu* or *ex delicto*, are transitory and may be brought anywhere, whatever the residence of the parties. In contemplation of law, the injury arises anywhere and everywhere. The right to recovery rests on the presumption that the common law prevails where the cause of action arose and that the plaintiff could have recovered there (citing *Leonard* v. *Columbia Steam Company*, 84 N. Y., 48).

As soon as one person becomes liable to another in such action, that liability attaches to the person and follows him wherever he goes. He cannot, by removing from one place to another, discharge himself of that liability."

This case seems to be an authority upon almost every proposition which we advance in our case.

V.

Proof that the defendant, by force, had taken physical possession of the city of Bolivar and was exercising power and control there, is not sufficient.

The allegation of the answer is not that the city of Bolivar had seceded or separated itself from the rest of Venezuela, or attempted to do so, and that the defendant was the government *de facto* in that city in this new sovereignty, but the allegation is that the defendant was "the chief executive representative of the *Venezuelan*

government in and about Ciudad Bolivar" (fol. 22). The defendant, to maintain this defense and to succeed in his case, must show that he represented "the *Venezuelan* government" and was its representative.

This he comes far short of doing. He shows clearly enough the physical power that he was able to exercise for this short period in the city of Bolivar—it was from that physical power that the plaintiff suffered—but he utterly fails to show any connection with the Venezuelan government or any one claiming or asserting to be the government of Venezuela. On the contrary, all the evidence goes to show that he had to defeat the *government* forces and drive out the *government* officials before he could exercise his power in the city.

VI.

"War in an international and public sense is a prosecution by a nation of a right by force. * * * It must be by a nation or body of men claiming to be a nation; war in this sense is not constituted by hostilities by a private person or group of persons." (Wharton's Commentaries on American Law, Section 454.)

> "It is necessary, in order to place the members of an army under the protection of the law of nations, that it should be commissioned by a State. If war were to be waged by private parties, operating according to the whims of individual leaders, every place that was seized would be sacked and outraged; and war would be the pretense to satiate private greed and spite. Hence, all civilized nations have agreed in the position that war to be *a defense to the indictment for homicide or for wrong*, must be conducted by a belligerent state, and that it cannot avail

voluntary combatants not acting under the commission of the belligerent." (Wharton's Commentaries on American Law, Section 221.)

"It must be remembered that only states can be parties to a war. A band of marauders, which, without incorporation into the army of a specific sovereign, undertakes to perform acts of war, subjects its members to indictment for murder or robbery, as the case may be. Whether, however, when an insurrection exists, the insurgents are to be treated as belligerents, is a difficult question dependent upon the extent to which the organization of the insurgents has acquired local authority and permanence." (Wharton's Commentaries on American Law, Section 210.)

" In what, then, does the full measure of the rights possessed by a belligerent over his enemy consist?

There are three broad Rules of War by which the conduct of the civilized belligerent appears to be in our day guided:

(*a*) A combatant to be lawful must be commissioned, or be a member of a levee *en masse* rising on the approach of an invader." (Walker on International Law, page 266.)

* * * * * *

To bring himself within these rules so as to escape civil and criminal liability for his acts, the defendant must show that he was acting under a commission or authority from the nation or government of Venezuela, or at least from some one claiming to be or to represent the nation or the government.

This he has utterly failed to do. It does not appear in the case that the revolutionary party—if such party there was—during the time when these outrages were committed upon the plaintiff, had any authority or permanence whatsoever. It does not appear that it had a leader or organization, that it had an army, or that it was in possession of a single place. There is no evidence of what the revolutionary party consisted, whether it had

5 or 5,000,000 members, whether it had an army of 5 or 5,000 soldiers. Can the Court assume, because a man named Crespo entered Caracas in October, anything else whatsoever about him or his army in August? Or that Hernandez, during August and September, had a commission or authority from him?

In *Freeland* v. *Williams*, 131 U. S., 405, it is held that whether the defendant "was or was not a soldier in that army" was a question determinable in the action and made the basis of the defense.

Has the defendant here proved, so positively and clearly as to justify the court in taking the case away from the jury, that he was a soldier or an officer in any army that represented or claimed to represent the Venezuelan nation? On the contrary, he has not shown that he had any commission or authority from any power whatsoever or that he had any connection with any one outside of the immediate vicinity of the little lonely city of Bolivar. He proved no commission from Crespo or from any one else. Nothing is shown as to his rank or title. He was called simply "General"—whether Lieutenant-General, Major-General or Brigadier-General does not appear. The word "General" seems to have been a title of respect rather than an evidence of rank. There cannot be an organized army without grades. Every person must be in a definite place.

There are other circumstances indicating that Hernandez was on an independent basis. He had himself raised the body of personal followers that he commanded. They came from that neighborhood. They had no special uniform. One witness said they had the usual blanket, which is a civilian and not a military garment in that country (fol. 120). Mrs. Underhill says of those who were guarding the house, "Some of them had sabres, cutlasses, some different weapons—weapons of different kinds" (fol. 115). Even as to the white band around the hat—

they had various legends on it—"El Legalista," "Vive Hernandez," etc. (fol. 71), nothing to indicate connection with any larger body, and the latter legend implying—if it implied anything—that Hernandez was their only superior and that they were his personal followers.

It also appears that there were different groups of revolutionists—Crespistas, Gordos, etc. (fols. 110 and 84), besides these Hernandists; and it does not appear that the groups were ever united or acted in unison. Crespo was simply the one who succeeded in capturing the city of Caracas some time after these outrages upon Underhill (fol. 84).

Nor does it appear that the leaders of the revolutionary army or party, whoever or whatever they were, ever recognized, approved of or adopted Hernandez's actions. The fact that we find him in prison in his own country for fomenting sedition a short time before this (fol. 66) and in the United States, apparently an exile, a short time afterwards, would seem to indicate that Hernandez was very far from being at any time "the chief executive representative of the Venezuelan government" anywhere.

VII.

There is nothing in Mr. Underhill's testimony which sustains the defendant's contention that he was "the chief executive representative of the Venezuelan government in and about Ciudad Bolivar."

1. The verdict was not directed by the learned Judge on that ground.

Judge Wheeler's theory of the law was that if a man "has got so far as to have an army under his command and in control of a place, civil and military," he is not liable civilly or criminally for his actions (fol. 132). The

reason given in his final decision (fol. 134) for directing the verdict for the defendant was that "what the plaintiff claims to recover for is for what it is claimed to be proved that the defendant did in the way of restraining him in his house *as commander-in-chief of soldiers.*"

It seemed to the learned Judge at the trial that the defendant had proved enough to clear himself from liability if he had shown that he was in actual command of an army and thereby in physical control of a place without regard to whether that army represented a nation or a central government, or whether it had been levied by a private individual and was simply the instrument for the enforcement of his own individual desires, good or bad.

If the learned Judge was right in his opinion of law, we have no grievance of which we can complain to this Court. Our appeal is based upon the belief that the learned Judge was entirely wrong, and that for the defendant to justify himself, he must show that his army was a part of the national forces, or at least of revolutionary forces seeking to establish nationality, and that he himself held a commission or authority from some central national power.

2. Mr. Underhill had no such knowledge, and did not claim to have any such knowledge of events in Venezuela outside of the city of Bolivar as would enable the defendant to prove by him his own (the defendant's) authority or the connection of his army with any other governmental or revolutionary forces in the nation.

Underhill was a foreigner and a comparative stranger. He had an imperfect knowledge of the Spanish language (fol. 95). He did not take any interest in Venezuelan politics (fol. 85), and did not read the newspapers of the country (fol. 84). He had at one time been employed as engineer at the Callao Gold Mine, some two hundred fifty miles from Bolivar, for about a year, and had had

charge of the water-works of the city of Bolivar for three or four years (fol. 61). He, of course, knew well enough what was going on in the city of Bolivar, for it was a small town, but outside of Bolivar City he had no knowledge, and very little of even hearsay information as to what was going on.

His testimony as to what actually took place in Bolivar City is most reliable. His testimony as to events outside is of no value, for he could have no knowledge in relation to them. He certainly could not know and did not know anything about Hernandez's relations—if he had any—with other insurgent chiefs.

If Hernandez wished to prove that he had a commisson or authority from any central or national governing power, he, and not Underhill, was the proper witness by whom the proof should have been made. Not having been called himself as a witness, nor having offered any competent or satisfactory evidence on the subject, it must be presumed that he had no such commission or authority and that he was acting independently and on his own responsibility.

Certainly a presumption to the contrary cannot be indulged in and a direction of a verdict for the defendant was error.

3. On cross-examination, after Mr. Underhill had disclaimed any knowledge as to political or military events outside of the immediate vicinity of Bolivar City, and especially any knowledge of Hernandez's relations—if any he had—with any other revolutionary chieftain, the defendant's connsel asked him what he had heard and read on that subject, but he had not even heard or read anything which, if proved by competent and satisfactory evidence, would help the defendant in this case.

Some time in October or November of the year 1892, after Underhill had escaped and was safe under the British flag at Trinidad, he read in the newspapers, or heard in some way, that Hernandez belonged to the Crespo *party* (fol.

84), but that is very far from even having read or heard that Hernandez, at the time he inflicted these injuries upon Underhill, had a commission or authority to represent the government of Venezuela or the revolutionary chief, Crespo, or any one else in the City of Bolivar, or to inflict these outrages upon the unoffending plaintiff.

If Hernandez was a part of the Venezuelan government or held a subordinate position under a superior revolutionary chief, such as would protect him from liability, it was easy enough for him to show it clearly and satisfactorily. Not having so shown, the contrary is to be presumed.

4. Much less could the fact that Mr. Underhill had *read* or *heard* something—which he could not possibly, from the nature of things, *know*—be such positive and irrefragable evidence that what he had read or heard was true as would justify the Court against our objection in taking the question from the jury when the defendant himself, who must have been able to give positive and convincing evidence upon the subject one way or the other, sat in the court-room with his mouth closed all through the trial and offered no evidence upon the subject with which he was, of all men, necessarily most familiar.

The simple fact of the defendant's silence upon this subject upon which he was so well qualified to speak, and of which he alone could speak with certainty, would have been enough to justify the jury in finding against him on this issue, no matter what evidence Mr. Underhill might have given upon the subject as to which he concededly knew, and could know, nothing.

VIII.

"Civil and Military Chief."

The evidence showed that the defendant used a letter-head or stamp reading, "Office of civil and military chief

of the Guayana section, Territory of the Delta, river districts north of the Orinoco."

This was the stamp of the "Jefe Civil" or local judge of that district (fol. 78). Hernandez, with his armed force, seems to have driven out these local officers and to have assumed their place as a sort of "Pooh-bah." At any rate he made quite free with their stationery. He signs himself, "Dios y Federacion. José Manuel Hernandez." When we get to "José Manuel Hernandez," we seem to have reached the end. It was the final source of power for these two months in this little city on the Venezuelan desert (fol. 78). Another title given him in the evidence was "Great Mogul" (fol. 71). The Corsicans and Italians who composed what was called his army wore bands on their hats with such mottoes as, "Vive Hernandez!" "We are the Law!" "Hurrah for the Law!"—that is, the law of which they were the exponents; "Down with the Government,"—the cry of all mobs (fol. 71). Hernandez seems to have been ordinarily addressed as "Civil and Military Chief" (fol. 91).

Now, the Constitution of Venezuela is in evidence (fols. 32–60). It shows the nation to be a federal republic with very much such institutions and guaranties of political and personal rights as we have. Authority proceeds from the people and no one could be legitimately "Civil and Military Chief," or rightly exercise the powers which Hernandez seemed to revel in during this period in this little city unless he derived his authority from some source other than himself or an army collected and equipped by him.

If Hernandez did have any such authority it was his place to prove it at the trial. Not having so proved it, it must be presumed that he did not have it.

If the title he assumed, "Civil and Military Chief," meant that he wished to be known as the "Jefe Civil" of that district, he should have shown how he came to be so

suddenly elected and elevated to that judicial office. If it meant that he assumed to be the arbitrary dictator and dispenser of all power in the district where his Corsicans and Italians were able for the time being to drive away all the previously constituted civil and military authorities, he should show how he came by that supreme dignity. It will hardly be contended that stamping his letterheads with the words, "Civil and Military Chief," was sufficient evidence that he was "the chief executive representative of the Venezuelan Government."

IX.

Buena Vista and Bull Run; Hernandez and General Beauregard.

The learned Judge at the trial, in directing a verdict, compared this case with that of a Virginia farmer attempting to sue General Beauregard for what he did at the Battle of Bull Run, for tearing up his grass and making mischief there (fols. 134 and 135).

We submit that the comparison was an unfortunate one.

General Beauregard—like Washington in the time of our Revolution—was in command of an army representing a large portion of the states of the United States which had assumed to secede and to set up a separate government, and were attempting to establish their right to be recognized as one of the nations of the earth. The confederate government had a president, cabinet, congress, supreme court and complete system of judiciary. Eleven of the states of our Union had, by their legislatures, passed formal acts of secession and brought the whole machinery of their state governments under the national banner of the confederacy. The same is true of our colonies in the Revolution. General Beauregard held a commission from this supreme central authority or government of the Con-

federate States—as Washington held one from the Continental Congress—and was in command of an army raised by that government for the purpose of defending the territory in which it assumed to be supreme from what it considered hostile foreign invasions.

General Beauregard was undoubtedly entitled to wage war with his army, and was protected in doing whatever was necessary to be done in the conduct of such war. So far as the pleadings claim or the evidence shows in this case, Hernandez had no commission from any central power or authority. He did not represent the Venezuelan nation or any portion of that nation which was attempting to secede and separate itself from the rest and to establish a new nationality. He simply had under his command a few—he, the only man here that knew, did not deign to tell us how many—Corsicans and Italians that he had levied in the immediate vicinity of the City of Bolivar, differentiated from the community around them only by white bands on their hats covered with anarchistic mottoes and expressive of their personal fealty to him, and this armed body that he had personally got together and who obeyed his commands had driven away the constituted authorities of the state from this little desert city, and for the time being he assumed to himself the power of life and death, and of granting or withholding personal liberty over the unfortunate inhabitants of the little town that was in his power.

There is nothing at all in the evidence of this case that can possibly be so far stretched as to make it appear that Hernandez had any right whatever to wage war or that he had any power or authority except such as the preponderance of his physical force in that small place, for the time being, gave him.

A better illustration would have been to compare Hernandez in the City of Bolivar with the Paris Commune than with Beauregard's army in Virginia. The Paris Com-

mune was more absolute in the city of Paris and exercised there more of the powers and performed more of the functions of government—however badly they may have performed them—than Hernandez ever did in the City of Bolivar, and, like Hernandez at Bolivar, but unlike Beauregard at Bull Run or Washington in the Revolution, the Paris Commune did not represent a nation or any portion of a nation that was trying to secede or separate itself and create a new nationality; but it represented only a single city of a nation in which, for the time being, they had succeeded in acquiring absolute power.

The only distinction which can be drawn under the evidence in this case between Raoul Rigault, the head of the Paris Commune, and José Manuel Hernandez, "Civil and Military Chief" of the City of Bolivar, is entirely favorable to Rigault and his Commune.

Hernandez had within his power a little city of some ten thousand people on the Venezuelan desert. Rigault and his Commune were in control of the second greatest city of the world, supposed to be the centre of the world's civilization. Hernandez governed, so far as he governed at all, by himself alone. He shared his power with no one. He did not trouble himself with any elections or permit any officials to assume authority except by virtue of personal appointment from himself. Rigault, two days after he seized the city, ordered elections in every district of the city and the persons so elected came together and constituted the Commune, representing, or pretending to represent, the Parisian people and constituting the government—in form, at least, a representative government.

Rigault's Commune had a government seal regularly engraved to order; not simply a stamp for letter-heads such as Hernandez had stolen from the officials of the government he had driven out.

Rigault's Commune had under their command more than 125,000 soldiers—more than Washington ever commanded

from the beginning to the end of the American Revolution. At the time of the triumph of the national troops from Versailles, 700,000 weapons of various kinds were taken from the Communards—probably more than there were in 1892 in all Venezuela. The Commune had 1,700 pieces of artillery; Cuba, recognized by the political department of our government, and decided by this Court, to be in a condition of civil war, has never had more than 20 pieces of artillery all told. The power of the Commune lasted from the 18th of March, 1871, to the 28th of May—quite as long as the power of Hernandez lasted in Bolivar. During this period of seventy days, the Paris Commune was the only government that exercised any power or jurisdiction or authority whatever in the city of Paris and its immediate environments—a power quite as absolute and infinitely greater and more extended than that exercised by Hernandez at Bolivar.

And yet hundreds—if not thousands—of the Paris Communards were executed for the murder of the hostages—who were killed as an act of war by order of the Commune—and great numbers of others were punished in other ways for fighting in the ranks of Rigault, and the voice of no civilized nation was ever raised in their behalf to assert that they were simply waging war and protected on this account from the consequences of their warlike acts. Those who escaped punishment did so by hasty and concealed flight, and by living in secrecy and in exile in every obscure corner of the world. Few, if any of them, were ever sued civilly for what they did as members of the Commune or as soldiers in its army, because it has not been generally supposed that a judgment against them would be of any considerable value; but is there any doubt, if such a suit was brought in France or in the United States or anywhere, that it could be maintained?

X.

The defendant is limited in his justification by the allegations of his answer.

No attempt was made to amend before the trial, on the trial, or since, nor has the defendant intimated in any way, at any time, that he desired to be free from his own self-imposed limitations. We were governed in the presentation of our case by the issues as they were formulated by the pleadings. The verdict was directed against us on the issues and the evidence as they stood, and we were not called on or permitted to meet any other issues.

The only plea in justification is that

> "Whatever was in fact done or authorized by him- * * * was so done or authorized by him in his official capacity as the executive representative of the Venezuelan Government in and about Ciudad Bolivar in the lawful and proper exercise and discharge of his duty and authority as such official, and not otherwise." (Fol. 22.)

The allegation is not that he had an army under his command who obeyed his orders, nor that he was in possession of the powers and performed the functions of a government *de facto* for the City of Bolivar, nor that a portion of the Venezuelan nation had seceded or tried to do so, and had set up a government of its own and that he represented this government, nor that a revolution was in progress against the government, from the central governing body of which revolution he had a commission, nor that he afterwards made his peace with the revolutionary party or parties who finally prevailed so that he was taken in, but it is that at this time, when these acts of which we complain were done, he was the chief executive representative of the Venezuelan government in and about Ciudad Bolivar and that what he did was done as such chief executive representative.

Nothing short of full, satisfactory and conclusive proof of this allegation will satisfy the requirements of this defense and justify the direction of the verdict for the defendant. The defendant cannot here amend his answer or change the ground of his justification, so as to make the direction of a verdict right now when it was wrong then.

Such justification must be pleaded, and the justification that is proved must be the justification that is pleaded. Evidence of such a justification not pleaded would not avail unless the pleading were amended at the trial so as to cover the justification sought to be proved.

To take Judge Wheeler's illustration given at the trial (fols. 134 and 135), if General Beauregard had been sued for trespass committed on a Virginian farm at the battle of Bull Run, and he had pleaded that he was "the chief executive officer of the Government of the United States in northern Virginia," and that his acts were done in "the lawful and proper exercise of his duty and authority as such official," it would not avail him to attempt to show under that plea that he was the general in command of the forces of the government of the Confederate States, and was engaged in making war on the United States. The evidence must fit the plea.

Mostyn vs. *Fabrigas*, 2 Smith's Leading Cases, 916.

In this case there is, in the evidence, no pretense that Hernandez was the representative of the government of Venezuela. The motto of his followers was, "Down with the Government"—that is, with the government of Venezuela; "Vive Hernandez"—that is, long life to the man who is in rebellion against the Venezuelan government, and has succeeded in driving out of this city its constituted authorities (fol. 71). The Battle of Buena Vista, which Hernandez won, was a victory over the government

troops (fols. 71 and 83). If he had any sympathy or affiliation with any other revolutionary leader—there is no evidence that he had any connection with or authority from them—it appears to have been with Crespo who, so far from being the government, was at this time leading a revolution against it which finally, some time afterwards, overthrew it. He seems to have been, like the newly landed Hibernian, as told in the story, always "agin the government."

He certainly does not appear to have been "the chief executive representative of the Venezuelan government in and about Ciudad Bolivar."

II.

The existence of civil war in Venezuela in 1892 was not in any way recognized by our government during the times in question. Therefore, our courts must consider the ancient state of things as continuing and Hernandez as a private party without any right to wage war.

Even if Hernandez had shown (which is not the case) some connection between himself and Crespo or some revolutionary body, the burden was further upon him to allege and show the existence of a state of civil war and he has done neither.

Civil war is his only defense. As was said in *Ford* vs. *Surget*, 97 U. S., 594, with regard to our rebellion—where, from the first, the belligerent rights of the Confederacy had been acknowledged—unless civil war existed,

> "Then the officers and soldiers of their army were mere pirates and insurgents, and every officer, seaman or soldier who killed a federal officer or soldier in battle, whether on land or on the high seas, is

liable to indictment, conviction, and sentence for the crime of murder." (Page 623.)

Insurrection is no defense. Insurgents, no matter how pure their motive or what their power, are only robbers and murderers. To change them into people having the rights of war, the one thing necessary, so far as the courts of this country are concerned, is recognition as such in some way by the political department of our government. There is no evidence in this case of such recognition of any revolutionary party. In fact, we think the Court must take judicial notice that there never was such recognition. No foreign government ever recognized them as belligerents and there is no evidence that they were treated as belligerents by the legitimate government.

The recognition or non-recognition of a state of civil war in a foreign country is for the executive department, and until the executive has acted the courts must act on the basis of the old state of things. They cannot take evidence as to whether there really was a war or not. This is settled law in the United States.

Rose v. *Himely*, 4 Cranch., 241;
U. S. v. *Palmer*, 3 Wheat., 610;
Gelston v. *Hoyt*, 3 Wheat., 246;
Gelston v. *Hoyt*, 13 Johns., 561;
Freeland v. *Williams*, 131 U. S., 405;
Kennett v. *Chambers*, 14 How., 38;
The Ambrose Light, 25 Fed. Rep., 408;
The Itata, 56 Fed. Rep., 505;
U. S. v. *Trumbull*, 48 Fed. Rep., 99;
The Conserva, 38 Fed. Rep., 431.

Rose v. *Himely*, 4 Cranch., 241. Rose was the owner of a cargo of coffee which was shipped from San Domingo, which was then in possession of the brigands (meaning the inhabitants of San Domingo), and was captured by a French privateer and sold. Being brought into South

Carolina, the original owner libelled it. At the time of the capture, the inhabitants of San Domingo were in revolt against France, of which they had been a colony.

The libel of the original owner is upheld.

The Court says:

> "The Colony of San Domingo, originally belonging to France, had broken the bond which connected her with her parent State, had declared herself independent, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and San Domingo. It has been argued that the colony, having declared itself a sovereign State, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, *courts of justice must consider the ancient state of things as remaining unaltered*, and the sovereign power of France over that colony as still subsisting."

United States v. *Palmer*, 3 Wheat., 610. In this case the parties had been indicted for piracy upon the high seas. They were evidently acting under a commission from the colony of some country which had revolted, but it does not appear in the case what the colony was. The case came up on a certificate of division from the Circuit Court.

The Court, in its opinion, says:

> "When a civil war rages in a foreign nation, one part of which separates itself from the old established

> government and erects itself into a distinct government, the courts of the nation must view such newly constituted government as it is viewed by the legislative and executive department of the government of the United States. If the government of the Union remains neutral, but recognizes the existence of a civil war, courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy."
>
> "To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arraign the nation to which the Court belongs against that party. This would transcend the limits prescribed to the judicial department."

In *Gelston* v. *Hoyt*, 3 Wheat., 246, Hoyt sued Gelston in trespass for the value of a ship. Gelston was Collector of the Port and Hoyt the owner of the vessel. Gelston had seized the ship as violating the neutrality laws on the ground that she was being fitted out to be employed in the service of Petion, who then ruled a part of the Island of St. Domingo, to commit hostilities on that part of the island which was then under the government of Christophe. The Court held that the defendant was liable, and that the seizure was illegal upon the ground that neither Petion nor Christophe had been recognized as belligerents by the United States Government, and that, therefore, under international law they had no right to make war against each other. Story, J., delivering the opinion, says:

> "No doctrine is better established than that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unal-

tered. This was expressly held by this Court in the case of *Rose* v. *Himely*, 4 Cranch, 241, and to that decision on this point we adhere, and the same doctrine is clearly sustained by the judgment of foreign tribunals" (quoting cases).

In *Gelston* v. *Hoyt*, 13 Johns., 561, which was this same case in the court below, Ch. Kent takes the same ground, saying:

> "It is a very strange and novel doctrine that it belongs to the municipal courts to anticipate the views and distract the policy of the Government by being the first to acknowledge new States as they may successively arise in the revolutions of the world. There never could be more unfit organs for this purpose. The courts are, by their very constitutions, passive and tranquil and devoted to the administration of domestic justice. They have no concern of foreign intercourse, and no knowledge of the secret springs and complicated policies of nations. Among all the volumes on public law not a passage is to be found which bestows such a function upon the judicial power; and as often as the question has arisen in the discussions on private right, the Judges have uniformly disclaimed the authority."

In an exceedingly interesting foot-note to this case in 13 Johns., 588, Ch. Kent reviews the history of the convulsions and revolutions of Hayti, as illustrating what a delicate question the recognition or non-recognition of belligerent rights was in any event, and how inappropriate it was for the decision of a court.

In *Freeland* v. *Williams*, 131 U. S., 405, in which a Confederate soldier was sued in trespass for taking cattle, the Court held that the question of whether the soldier was entitled to the exercise of belligerent rights was the fundamental fact in the case. The Court says:

> "It is not here denied that the doctrine of *Dow* v. *Johnson* is correct, and that parties are protected by that doctrine from civil liability for any act done in

> the prosecution of a public war. But one of the very things to be decided, when an act like this is brought in question, and the defense is that it was done in the service of belligerent rights, is whether this defense is established by the evidence" (p. 417).

In *Kennett* v. *Chambers*, 14 How., 38, the same rule is applied as to the illegality of a contract attempted to be made between a citizen of the United States and an inhabitant of Texas, which was at that time in revolt against Mexico. The Court, Chief-Justice Taney delivering the opinion, says:

> "It belonged to the government and not to the individual citizens to decide when that event (the independence of Texas) had taken place. * * * Nor can the subsequent acknowledgment of the independence of Texas and her admission into the Union as a sovereign State affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from the events which afterwards happened."

The *Ambrose Light Case*, 25 Federal Reporter, 408, is cited here for the reason that it contains a very careful, able and full review of the law upon the subject, and it has been cited with approval by the Circuit Court of Appeals in the "Itata" case, 56 Fed. Rep., 505. The "Ambrose Light" had been commissioned by some insurgents, who were revolting against the United States of Colombia, and was captured by some Americans on the high seas. The Court held that the capture of the vessel as a pirate would have been justifiable if our Government had not recognized those insurgents as having belligerent rights; that in this case, a letter of the State Department, written on the very day of the seizure, had recognized the insurgents as having belligerent rights, and that therefore the vessel was not liable to seizure. In the course of the opinion, the Court says:

> "But these circumstances, as well as the general

merits or demerits of the struggle, are, in view of the Court, wholly immaterial here; because, as will be seen, it is not within the province of this Court to inquire into them or to take any cognizance of them except in so far as they have been previously recognized by the political or executive department of the government. The consideration that I have been able to give to the subject leads me to the conclusion that the liability of the vessel to seizure as piratical turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation. * * * Private warfare is unlawful. International law has no place for rebellion, and insurgents have strictly no legal rights as against other nations until recognition of belligerent rights is accorded them. Recognition of belligerency, or the accordance of belligerent rights to communities in revolt, belongs solely to the political and executive departments of our Government. Courts cannot inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments, and recognize only what those departments recognize, and in the absence of any recognition by them, must regard the former legal conditions as unchanged."

In the "Itata" case, 56 F. R., 505, which was the case of a vessel belonging to the Congressional Party of Chili that was seized and attempted to be forfeited under the neutrality laws of the United States, the Court says:

> "The law is well settled that it is the duty of the Courts to regard the status of the Congressional Party in the same light as they were regarded by the Executive Department of the United States *at the time the alleged offenses were committed* (quoting the cases above quoted on this brief). It being admitted that the Government of the United States at the time of the commission of the alleged unlawful acts did

not recognize the Congressional Party as being entitled to any belligerent rights, it would seem to follow that it was within the power of the Government at its option to treat the party as pirates if the facts warranted and justice and policy so required."

In *U. S.* v. *Trumbull*, 48 Fed. Rep., 99, which was the "Itata" case in the Court below, the Court says:

> "It is beyond question that the status of the people composing the Congressional Party at the time of the commission of the alleged offense is to be regarded by the Court as it was then regarded by the political or Executive Department of the United States. This doctrine is firmly established." (Quoting cases.)

The Conserva, 36 Fed. Rep., 431. This is the case of a vessel fitted out in the interests of Hippolyte against Legitime, the recent rivals in San Domingo. The Court held that the vessel was not liable to seizure, for the reason, among others, that it did not appear that the United States Government had ever recognized as a belligerent power either Hippolyte or Legitime, but, on the contrary, the evidence showed that the Government had not recognized either of them. It was therefore a private vessel fitted out for private war—that is, it was a pirate liable to seizure under the piracy laws.

It is to be noted that among the above authorities the following distinctly hold that the act is to be judged of by the existence or non-existence of recognition *at the time it occurs*, and that recognition cannot act retroactively to legitimatize an act unlawful at the time.

Kennett v. *Chambers*, 14 How., 38;
Itata, 56 Fed. Rep., 505;
U. S. v. *Trumbull*, 48 Fed. Rep., 99;
Ambrose Light, 25 Fed. Rep., 408.

The Court below, in our case, was troubled because this doctrine might make the Confederate soldiers of our Re-

bellion responsible. We have already shown how entirely different was the position of the confederate armies in our war, representing a government thoroughly organized in all its departments, claiming jurisdiction over a vast extent of territory and millions of people, and seeking to establish for itself a place among the nations of the earth, from that of the little band that Hernandez had personally enlisted and equipped, and which succeeded for a little time in driving out the government officials and in wielding power in the little city of Bolivar, in Venezuela. But even if there were not this difference, it would be a sufficient answer to Judge Wheeler's suggestion that the United States Government recognized our struggle as a civil war from the very beginning. The Prize Cases, *Ford* v. *Surget*, *Dow* v. *Johnson*, and numerous other cases in the Supreme Court, settle this.

A further objection may be made, that the rule we contend for may work hardship in some cases; that it is hard for any country to hold a successful general liable for what he did before recognition of belligerency. If there might be such a hardship in some cases, there certainly can be none in this. From the evidence in this case, there certainly can be no hardship in holding Hernandez responsible, but if there was a hardship, it would be no greater than many other hardships which the courts have to recognize. It is no harder than a refusal to surrender criminals whose crimes do not come within the Extradition Treaty; no more unfriendly to the succeeding faction than it is to refuse to surrender to it political refugees. It may be that a recognition of belligerency can be made retroactive if a country thinks it right to do so. It is for the executive to judge. But even if a few cases of hardship should arise, the evil would be small in comparison with the revolutionary license that a different rule would encourage. The Supreme Court, in *Hickman* v. *Jones*, 76 U. S., 197, did not hesitate to hold

that a party could sue for false imprisonment the members of a court of the confederacy who arrested and tried him for treason to the confederacy. The Court was not deterred by the multitude of similar cases which might arise, but which did not. As a matter of fact, in these times governments can and do act quickly. Within a month of the beginning of our civil war, the great nations of the world had recognized belligerent rights in the Confederacy by declarations of neutrality.

The recognition by our Government on October 23, 1892, of the new government of Venezuela, was not, and should not be, a recognition of civil war theretofore existing. If so, from what time? A new State must be recognized; that, the peace of nations ordinarily demands. But it is a very different thing to say that the recognition of this accomplished fact should carry with it a justification of all the methods employed to bring it about. Unless war is being carried on in an orderly way, pursuant to the modern rules of war in the Law of Nations, and unless the insurgent party has a fair show of success, it is just that the world should consider and try them as murderers; it is best for the world at large, for all the interests of humanity. Otherwise, revolution and insurrection are encouraged. When war is carried on contrary to those humane rules established by the law of nations, the party is at heart a real murderer.

Ultimate success or failure can have no bearing on the character of the act at the time. In case of failure of an unrecognized revolt no one will pretend that the rebels are not liable criminally and civilly. In case of success, the country can always protect and indemnify its adherents. If success, or final recognition, were the criterion, it might very well happen in the future that some Indian brigand of South America, or some half-barbarian black of San Domingo, who had gathered together a handful of half-clad adherents, would win immunity in the courts of

the world for all sorts of rapacity and wickedness. Nay, Christian governments will sometimes give no countenance to undoubted success. In San Domingo, Dessalines reigned as undisputed emperor from 1804 to 1806, but our government passed an act refusing to countenance in any way any of his acts.

XII.

The recent case of the "Three Friends," decided by this court March 1, 1897, is an authority in favor of Mr. Underhill upon the proposition contended for in the last point.

The question raised in the case of the "Three Friends" was whether the Neutrality Laws, U. S. R. S., Section 5283, applied at a time when the belligerency of the Cuban insurgents had not been recognized by the political department of our government. The statute prohibited the fitting out or arming of any vessel with intent "that such vessel shall be employed in the service of any foreign prince or state or of any colony, district or people" to cruise, etc., against the subjects, etc., of any foreign prince, etc. The Court held that recognition of belligerency was not necessary provided, however, that the political power of the government had recognized the existence of insurrectionary warfare prevailing "before, at the time, and since." Inasmuch as it was shown that the political power had recognized by proclamation an actual conflict of arms, this Court held that the Neutrality Laws applied and that the vessel fitted out to help the Cuban insurgents should be forfeited.

It follows from this opinion, that if there had been no recognition of insurgency by the political power of the government, the decision would have been to the con-

trary. In the case at bar the defendant made no proof that this government had ever, during the times in question, recognized the Venezuelan insurgents as insurgents or had recognized the existence of insurrectionary warfare. The record is silent on this subject. It therefore follows from the opinion in the case of the "Three Friends" that if Hernandez, in 1892, had conducted operations by sea, he and his followers might have been "pursued as pirates," and the same reasoning makes it apparent that the acts of Hernandez by land were those merely of a bandit or freebooter and that he is personally responsible for his acts.

This court said in the case of the "Three Friends":

> "*Nesbitt* vs. *Lushington*, 4 T. R., 783, was an action on a policy of insurance in the usual form, and among the perils insured against were 'pirates, rovers, thieves,' and 'arrestes, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever.' The vessel with a cargo of corn was driven into a port *and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates.*"

In the case at bar the acts on land were those of an irresponsible mob under the leadership of Hernandez.

This Court also said in the case of the "Three Friends":

> "Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, *recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. The Ambrose Light*, 25 Fed. Rep., 408; 3 Whart. Dig. Int. Law, Sec. 381; and authorities cited."

Before the acts of Hernandez can be justified this court must find from the record that the political power of this

country at the times in question recognized at least a state of insurrectionary warfare in Venezuela. In the case of the "Three Friends" this Court predicated its decision upon the fact that the President, by various proclamations, had recognized such a state of warfare. And the Court say:

> "We are thus judicially informed of the existence of an actual conflict of arms."

In the case at bar there is no evidence of any such proclamation or recognition of any kind.

XIII.

Even assuming that during the times in question civil war existed in Venezuela, that the evidence disclosed a connection between Hernandez and some revolutionary body, this would be no protection to the defendant if he exceeded or disregarded the laws of war and acted wantonly or maliciously.

International law makes a military commander personally responsible for all acts ordered or done by him which are merely wanton or malicious, or not necessary to the prosecution of the war.

Let us assume, for the purpose of this point, that a civil war was raging in Venezuela at this time, to which the laws of war applied; that this court can take cognizance of that fact; that Hernandez was a part of the revolutionary army, and as such had the right to rule under martial law in Bolivar. Nevertheless, he had no right to do what he did do to the plaintiff.

The right to rule under military law is not a right, at least in a constitutional country, to rule according to one's

own will. Military law, or the law of military occupation, or conqueror's law, or whatever it may be called, is just as much law as the civil law is. It is in substance the rules of war established by international law, superadded to, and so far as they must, superseding the civil law. It is the glory of international law that it has placed limitations upon the passions and tyranny of men in war, soldiers and commanders. They may kill the enemy in battle, but not after he has surrendered. The persons and property of non-combatants are held inviolate, except so far as they must indirectly suffer from lawful military operations. These and other humane rules do not need citation of authority.

A military commander, whether exercising martial law on the part of the government against rebels, or whether exercising it as a conqueror or invader over the enemy's territory, has no right to do anything beyond what is necessary for the suppression of the rebellion or the prosecution of the war. For anything done wantonly or capriciously he is personally responsible; and also for anything done beyond his power, although done in good faith. He is not responsible for unnecessary acts, if, under the circumstances, they seemed necessary, but he must show the circumstances justifying such appearance to him, in order to relieve himself from responsibility.

Whatever may be the rule in monarchal countries; whatever may have been the rule prior to a hundred years ago, when the lamp of freedom was lit; that is the rule now for all free constitutional countries.

The constitution of Venezuela provides that the dispositions of the law of nations shall be especially enforced in cases of civil war (fol. 59). This gives the citizen and foreigner a municipal right.

Mitchell v. *Harmony*, 13 How., 115.
Luther v. *Borden*, 7 How., 1.

Forsyth's Cases and Opinions in Constitutional Law, page 214.

Stephens' History of the Criminal Law, page 215.

Field's Code of International Law, Sec. 725.

Hare on American Constitutional Law, Vol. 2, page 919.

International Law by W. E. Hall, page 469.

Halleck's International Law, Vol. 1, page 473; Vol. II., page 449.

Science of International Law by Walker, 1893, pages 281, 282.

Mitchell v. *Harmony*, 13 How. (U. S.), 115, is a leading case. The action was one of trespass by Harmony against Mitchell for taking his property. Mitchell was a Colonel in the army, serving under Colonel Doniphan, in the latter's expedition against Chihuahua during the Mexican war. Harmony was a merchant, following the expedition as such with his goods, and trading with the Mexicans on the way. As the expedition started Harmony was accompanying it voluntarily. After reaching the borders of Mexico Harmony desired to leave it, but this determination being made known to Colonel Doniphan, he ordered Colonel Mitchell to compel Harmony to remain with the expedition and accompany the troops, and he was forced to do so. This action of Colonel Doniphan and Colonel Mitchell was in perfect good faith, and was prompted by what they honestly believed to be a military necessity. When Chihuahua was reached Harmony's goods were unavoidably left behind, as nearly all of his mules had been lost in the march there and in the battle. When the Mexican authorities regained possession of the place, Harmony's goods were seized by them and confiscated, and were totally lost.

The Supreme Court, upholding a verdict for the plain-

tiff, holds that the military law, even in such cases as in the invasion of a foreign country, does not give the commanding officer the right to take the private property of a citizen, except in cases of immediate and impending danger to the property, or urgent necessity to the service, although done with perfect good faith; and that the officer is personally liable. The Court further holds that the burden is on the officer to justify his action, when it is called in question. The Court says:

> "Interference of the military power with the person or property of others than those impressed with the military character, those actually engaged in unlawful hostilities, or spies or pirates, when called in question in the civil tribunals can only be justified on the ground of a danger immediate or impending, or a necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for."

The defendant raised the point that the taking of the goods was justified, on the ground that it was to prevent the property from falling into the hands of the enemy, and also that it was taken for public use. The court below had instructed the jury—

> "That the defendant might lawfully take possession of the goods of the plaintiff to prevent them from falling into the hands of the enemy; but in order to justify the seizure, the danger must be immediate and impending and not remote or contingent. And that he might also take them for public use and impress them into the public service in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise" (p. 133).

This charge the Supreme Court approves, saying:

> "The instruction is objected to, on the ground that it restricts the power of an officer within narrower limits than the law will justify. And that when the troops are employed in an expedition in the enemy's country,

where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he will adopt; and if he acts honestly and to the best of his judgment the law will protect him" (p. 134).

"But we are clearly of opinion that in all these cases the danger must be immediate and impending; or the necessity urgent for the public service such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for" (p. 134).

"And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country or in his own" (p. 134).

"But it is not sufficient to say that he exercised an honest judgment, and took the property to promote public service; he must show by proof the nature and character of the emergency such as he had reasonable grounds to believe it to be" (p. 135).

Hare on American Constitutional Law, Vol. 2, page 919, says:

"Expediency, policy and a sincere regard for the public good will not justify the arrest of a citizen or an invasion of the rights of property, either in peace or war. Acts of this kind may be justified on the ground of necessity, which must, however, be urgent, actual and imminent. A belief that such a necessity exists will not be sufficient unless it is also shown to be well founded.

In analogy with the rights of a supreme commander, under martial law, are the rights of a subordinate military officer; and he is personally liable in damages if he exceeds his authority."

In *Dow* v. *Johnson*, 100 U. S., 158, the Court says:

"We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country

to which it belongs, and that he is no friend to the republic who advocates the contrary. The established principle of every free people is that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine of *Mitchell* v. *Harmony*, reported in 13 Howard; on the contrary, we approve it."

There is no position in the civilized world where a person can rightfully wield more arbitrary power than in that of a military conqueror over the country invaded. The most favorable position we can imagine for the defendant is to conceive of him as a military conqueror coming from a foreign country, and Bolivar the country he had conquered. As matter of fact, he did not come from a foreign country, but was a citizen of Venezuela; he owed allegiance to her laws, and was not trying to overthrow them. He was simply one who claimed the right to exclude the mayor, judges, etc., from their seats, and to execute the laws in their place. He had no quarrel with the people, only with the rulers. He was not a foreign conqueror, but a domestic intruder into office. But even if looked upon as a military invader, still, under international law, his rights would be limited and the law would still be above him, not under his feet.

"The rights of a conqueror are those of possession and not of title, and whenever brought in question must be proved and cannot be presumed."

Halleck's Inter. Law, Vol. 2, p. 449:

"In other words, he (an invader) has the right of exercising such control, and such control only, within the occupied territory, as is required for his safety and the success of his operations."

Hall's Inter. Law (1890), p. 469:

"An invader, therefore, lawfully may, over and above the exercises of a just measure of open force against the armed forces of his opponent, seize and make prisoners of the persons of important ministers

and officials of his enemy, supersede his laws, appropriate his public movable property, occupy his public buildings and sequestrate his public rents.

He may not ill-treat or abuse the person of an unoffending non-combatant inhabitant of the territory invaded, nor interfere with him and his in the pursuit of his ordinary peaceful associations, except in so far as the course of warlike movements renders such interference unavoidable."

Walker on the Science of International Law, 1893, pp. 281, 282.

The result would be the same, if he had been a rightful civil or military official of Venezuela, exercising martial law in the place.

The Court below held that the defendant was not responsible civilly because martial law prevailed there, and the civil law was suspended. There is no evidence of any declaration to that effect. Underhill says the place was not under martial law (fol. 106), that the town was perfectly quiet and orderly, and everybody was coming and going about the town, and to and from the town, as they pleased (fol. 106). But even if it was martial law, martial law does not mean the will of the officer. Hernandez did not profess to rule outside of the constitution; did not abolish the civil law; issued his orders in the name of the Republic, "Dios y Federacion" (fol. 78); call his troops "El Legalista," the law. In a constitutional country martial law is limited, and the exerciser of it is civilly responsible for any abuse or excessive use of it.

Luther v. *Borden*, 7 How. (U. S.), 1, is the case involving the Dorr rebellion in Rhode Island in 1842. The government of the state had called out the militia and declared martial law; and some soldiers had entered the plaintiff's house. He sued in trespass. It was held that the soldiers had not exceeded their authority, but the opinion

gives the limitations of the authority of the military under martial law, saying:

"And in that state of things (the state of war) the officers engaged in its military service (the service of the established government) might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. *If the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable*" (p. 46).

"For anything done in violation of the laws of war, the individual is liable to punishment. So, also, for any act within the rules of war not authorized or assumed by his government, as the act of the State."

Halleck's Inter. Law, Vol. 1, p. 473.

"If there be an abuse of the power so given, and acts are done under it *not bona fide* to suppress rebellion or in self-defense, but to gratify malice or in the caprice of tyranny, then for such acts the party doing them is responsible."

Forsyth's Cases and Opinions in Constitutional Law, page 214.

"Martial law is justifiable only by an absolute and overruling necessity. When such necessity exists, the rule may be exercised without a previous proclamation, and in any place actually possessed by a belligerent, whether an enemy or friend, but in no other place; *and it is always exercised at the peril of the commander.*"

Field's Code of International Law, Sec. 725.

"I may sum up my view of martial law in general in the following propositions:

1. Martial law is the assumption by officers of the crown of absolute power exercised by military force for the suppression of an insurrection and the restoration of order and local authority.

2. The officers of the crown are justified in any exercise of physical force extending to the destruction of life and property to any extent and in any manner *that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable, civilly or criminally, for such excess.* They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary course of justice can be reopened."

Stephen's History of the Criminal Law, page 215.

"A belligerent may, in carrying on his warlike operations, employ that amount of force, and that amount only, which is strictly necessary to overcome the resistance of his enemy."

Walker Inter. Law (1893), p. 266.

"The marauder and the assassin are not protected by any usages of civilized warfare."

Coleman v. *Tennessee*, 97 U. S., 519.

The bald ground upon which the motion to direct a verdict was made and granted was that in a war a general stationed in a town is the government for the time being, and is not personally answerable for what he does.

This theory, that the occupant of an office is, in that office, the Government, the supreme power, the sovereignty of the nation, and hence cannot be questioned by the judiciary, has been urged upon the Supreme Court in many cases both of civil officers and military commanders, and the Supreme Court has, in very strong terms, denounced it as entirely hostile to the theory of government of a

free people. The theory on which every customs case is brought is that of the personal liability of government officials.

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government, based on the sovereignty of the people from that of despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State—to say, '*L'Etat c'est moi.*' Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them, and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked, and of communism, which is its twin—the double progeny of the same evil birth."

Virginia Coupon Cases, 114 U. S., 291.

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to personal property, to which his defense is that he is acting under the orders of the Government. In these cases he is not sued as, or because he is, an officer of the Government, but an individual, and the Court is not ousted of jurisdiction because he asserts authority as such officer. *To make out his defense,*

he must show that his authority was sufficient in law to protect him." (Cunningham *v.* Macon, &c., 109 U. S., 452, citing Mitchell *v.* Harmony, and a number of other cases.)

This case and the above language is quoted with approval in *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S., 391.

And this principle applies to war as well as to peace, to military commanders as well as to civil officers. A general is no more the government than a collector of customs is. We have carried the Nation through the greatest civil war of the world upon the theory of law.

Mitchell v. *Harmony*, 13 How., 115.
Dow v. *Johnson*, 100 U. S., 158.
(Both quoted above.)

Gen. Canby (Raymond *v.* Thomas, 91 U. S., 712) had made while military commander over South Carolina, during the reconstruction period, an order which the Supreme Court held was beyond his authority to make. They say:

> "It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. *It is an unbending rule of law, that the exercise of military power, where the rights of a citizen are concerned, shall never be pushed beyond what the exigency requires.*"

Gen. Banks, in command at New Orleans on August 17th, 1862, issued an order to the banks that they pay over certain sums to the U. S. Quartermaster—debts owed by them to persons in hostility to the United States. The Supreme Court held that although in military possession of the place, it was an order that he had no authority to make, and that obedience to it by a bank did not discharge the debt. This was the case of

Planters' Bank v. *Union Bank*, 83 U. S., 483.

Ex parte Milligan, 71 U. S. (4 Wall., 2). This was the case of a private citizen arrested by a military tribunal in Indiana during the Civil War. The question was whether the arrest was authorized or not, the ordinary civil tribunals being then open. There was no question of his guilt of treasonable practices. It was held that the military did not have the authority to imprison him. The Court says:

> "In some parts of the country, during the War of 1812, our officers made arbitrary arrests, and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the Courts, were uniformly condemned as illegal. The cases of *Smith* v. *Shaw* (12 Johns., 257), and *McConnell* v. *Hampton* (12 Johns., 234), are illustrations which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench" (p. 125).

These are rights which Underhill had in common with every citizen of Venezuela, the right to demand that Hernandez should obey the constitution and respect the rights of every one to "personal liberty" and "individual security." But as a neutral, a citizen of another country, he had further rights. Under no character, invading conqueror, general of an army or mayor of Bolivar, did he have the right to the services of Underhill, a citizen of the United States. Even if he could have called Venezuelans to arms or detained them in Bolivar, he could not United States subjects.

> "And all natural-born or naturalized citizens of neutral states, who retain a neutral domicile, are, even though they chance to be on belligerent soil, entitled to be treated as neutrals and to be protected against the operation of hostile acts, so long as they refrain from unneutral conduct."
>
> *Walker Inter. Law*, p. 503.

"It is strictly incumbent upon every belligerent to rigidly respect the neutral character" (p. 505).

"A foreigner living and established within the territory of a state is to a large extent under its control; *he cannot be made to serve it personally in war.*"

Hall's International Law (1890), p. 497.

There is no such question arising here, as arises in cases of blockade. Perhaps if Hernandez had shut up Bolivar and allowed no one to depart, having the right to do so, Underhill would have had to stay, too, but others were coming and going all the time. It seems to have been *because* he was a Yankee that he was kept there. If this be the rule, it behooves United States capital, and energy, and industry, to stay out of these rich but uneasy countries. This is not a question of remedy, but of right.

If Hernandez had a *right* under the law of nations to keep Underhill there, Underhill has no remedy either in Court or diplomacy.

XIV.

The evidence in our case was sufficient to have authorized the jury to find malice on the part of the defendant, and this question should have been submitted to them.

The burden of proof is with the party setting up a justification. It would have been enough for us on the trial to show that Hernandez kept Underhill in Bolivar. That makes a case of false imprisonment. Much more, if we show that he confined Underhill to his house, and threatened, and insulted him; as we did. His justification, therefore, if there were any, is a matter of affimative defense.

But it affirmatively appears that there was no necessity

even for the detention of Underhill in Bolivar. Appropriate evidence establishing such a defense might have been such as that he had been an active partisan of the former government and was fomenting hostility to Hernandez, or taking some active measures to overthrow Hernandez's power in Bolivar, but nothing of that kind is pretended. He was a peaceful man, entirely neutral in their troubles, and a citizen of the United States. There was no pretense that he was in any way dangerous to Hernandez.

Hernandez gave as reason for keeping him, at one time, the water-works, that he was needed to run them. The water-works were not in operation, and could not be in operation for months (fol. 79 *et seq.*). Harold Jennings was there. He had managed the water-works for two years, and he was perfectly competent. The water-works themselves were not a civil, much less a military necessity; they were only a convenience. The people had all the water of the Orinoco there (the very water which was pumped through the water-mains) at their doors, in fact much too much of it in their very houses.

The reasons Hernandez gave at different times for the detention were different, and none of them bearing upon any military necessity. At the first interviews with Underhill, on August 14th, he gave no reason; simply said that the fixing of the steamer "Socorro" was the question at that time (fol. 72). Even if this had been the real or a justifiable reason, it ceased within a day or two, when the missing parts of the "Socorro" were brought back (fol. 73). At the many interviews with Underhill's messengers, who demanded a release for him, no reasons were given. At the second personal interview, when the imprisonment had lasted a month, Hernandez brought forward the water-works. At the last personal interview, after his sickness, the pretended reason for detaining him changed again, namely, to answer to some sort of court

for a pretended personal insult. No reason was given for keeping him under guard night and day.

The real reasons, to be gathered from all the evidence, were the tyrannous caprice of a new-made leader, or personal malice, or hatred for the United States and everybody connected with it, or an intent to deprive Underhill, for his own benefit or the benefit of the town, of his property in the water-works. This shines out through all the testimony. We may cite, as particularly showing it, the following: The cannon placed before the house, loaded and kept pointed at the house during the whole time (fols. 75, 115); the continual shooting at the house by the soldiery (fol. 76); the entirely unnecessary confinement in the house; the deprivation of food (fols. 99, 119); the mule episode (fol. 116); the refusal to let Mrs. Underhill go, and the false reason given therefor (fols. 77, 99); the contempt exhibited for the United States Government in saying that a United States gunboat would be powerless as against him, Hernandez (fols. 75, 98); the insistent demands for his private house, and that without providing another place for them (fols. 74, 116); the demands upon Underhill, while he was under duress and sick with brain fever, that he should sell the water-works, and Hernandez's threats to forfeit them entirely; the impossible demand that pumping should commence in eight days; the absurd demand that he should get bondsmen to secure his return; the pretense that Underhill's pathetic letter (fol. 91) was an insult, etc., etc.

That Hernandez knew of all that was going on cannot be doubted. Bolivar is not so large but that everybody is your neighbor, and you know all that happens to him. Underhill, too, was a marked man, an object of hatred as a Yankee (fol. 76). Hernandez passed there nearly every day (fol. 74), and his office was only a block or so away (see plan). He must have seen the cannon pointed at the house; heard the musketry; known of the howling

and abuse of them continually going on. He, in person, refused Underhill his liberty. He personally demanded that Underhill should sell the water-works, and told everybody that he should forfeit them (fols. 80, 93).

Ah! But they say that Hernandez did not imprison Underhill in his house because, we complain, that he demanded the house for himself. Perhaps, then, the pointing of the cannon, and the shooting at the house, were also only attempts to get them out. Underhill was in prison every moment after Hernandez arrived on the 13th of August, whether in his house, on the street, or at Hernandez's office. Is not a man with soldiers at his heels deprived of the personal security the constitution guarantees?

Surely there was ground in all this upon which the jury might have found that the acts of Hernandez were prompted by caprice or malice, and were not necessary for his military operations.

We submit that the learned Circuit Court of Appeals was not warranted in holding as a matter of law that the evidence "was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive."

XV.

The rejected evidence.

Certain evidence was rejected in the case which should have been admitted.

We offered to prove the contract under which the plaintiff was carrying on his business, showing his ownership of the water-works and of his residence (fol. 63); also their cost and value (fol. 64). These were material as showing the value; that they were his; that Hernandez had a motive in threatening its forfeiture, and a motive in heaping on him all the indignities and dangers, meanwhile

demanding the sale of the water-works. The contract would also show that it could not be forfeited for failing to supply the water in case of inundation, the contract itself excusing him in "all cases of unforeseen accident and force" (fol. 63).

We also offered to prove how Underhill was mistreated by the mob, and Hernandez's connection with the same (fols. 71, 112, 113, 119, 127); but this was all ruled out on the ground that we did not allege in our complaint any false imprisonment or assault and battery prior to August 13th, and what we offered to prove occurred on the 11th and 12th. This, it is submitted, was an immaterial variance.

The malicious character of what was done to Underhill on the 11th and 12th is sufficiently evident from what escaped into the case. It would have had a very material effect upon the jury.

XVI.

The judgments of the courts below should be reversed and the case remitted to the United States Circuit Court for the Eastern District of New York for a new trial.

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No. 36.

Reply Brf. of Logan & Dem P. C.

Supreme Court of the United States.

Filed Oct. 13, 1894.

GEORGE F. UNDERHILL,
Plaintiff-in-Error,

vs.

JOSE MANUEL HERNANDEZ,
Defendant-in-Error.

36

BRIEF FOR PLAINTIFF-IN-ERROR IN REPLY.

POINT 1.

The record is barren of proof to show that Hernandez was a military commander acting under the authority of any government, revolutionary or otherwise. Hence, the entire argument for defendant falls and the direction of a verdict was error because Mr. Underhill had made out a *prima facie* case.

The two briefs submitted by defendant-in-error assume that Hernandez had special civil and military authority and was acting as the representative of a government. Upon this assumption the defendant claims exemption for his acts. To establish this he necessarily relies on the plaintiff's evidence which merely showed what the defendant did and what he claimed, but there is no evidence, nor could there be, as to whether his claim to be a civil and military chief acting with due authority, was well founded or not. There was no proof to show that his acts were authorized by any government of Venezuela, either established or insurgent. No commission issued by any authority was proved nor any connection between him and his forces and any other organized body.

This was necessarily so. Neither Mr. Underhill nor any of his witnesses could have any knowledge of the authority under which the defendant acted. They could only testify to what he did or to rumors they heard about him. He came with an armed rabble of different nationalities, having no distinctive uniform, national or otherwise, and by mere force took possession and control of an insignificant City of Venezuela. Might was his right. He was a free lance, responsible to no one but himself so far as the record discloses, doubtless one of a number of independent leaders of petty forces, each striving to gain the control of the country, which control Crespo, subsequently was enabled to grasp. But the record is silent on the question of his authority. His acts were arbitrary and entitled to no greater sanction so far as the evidence discloses than those of Captain Kidd on the high seas or the Buccanneer Morgan when he captured and devastated Panama. That a mob has some semblance of organization and a leader, and has possession by right of force, is no justification for acts of intimidation and oppression.

Because of this utter absence of any competent evidence connecting Hernandez with any government or organized revolutionary body (even assuming that such evidence is material, which we deny for reasons set forth in our original brief,) the whole framework of defendant's argument falls. These are preliminary facts which must be first established to sustain the defendant's contention, and the burden of such proof, as we have heretofore shown, is on the defendant.

As the evidence stands the plaintiff established his case by showing the false imprisonment and the assaults and indignities suffered by and imposed upon him by the defendant or his agents. There he had a right to rest.

He had made a case for a jury. The defendant was called upon to answer. Hence it was error for the Judge to direct a verdict, for the court necessarily had to assume that there was evidence which did not exist. The burden was upon the defendant to supply it and this he did not do.

The matter is made quite clear if we consider an illustration from our Civil War.

Suppose the case of a man who had been imprisoned by some leader during the rebellion. Such a commander could not exonerate himself for his acts by showing that he was in command of troops and assumed certain powers.

He would have to go further and show by competent evidence, either oral or documentary, that he was acting for and on behalf of either the Union or Confederate cause and by their authority. The leader of a mere band of spoilers, robbers or guerrillas, subservient to no authority, self seeking, plundering federal and confederate alike, would not secure immunity in such a suit brought by one of his victims by simply showing that he was a military leader in command of a body of armed

men and had occupied a town or place by force of arms.

The briefs submitted by the defendant-in-error are wholly based upon the assumption which we have shown to be groundless. In the brief of Mr. F. R. Coudert, Point I, assumes that the defendant was a military commander acting in behalf of the government. Point II assumed that he was acting as an official of a Sovereign or a State. Point III that he was acting in a general war in behalf of a government. Point IV makes the same assumption with respect to his acting in behalf of a revolutionary government, and Point V assumed that he was an officer of an army maintained by a government.

An examination of the brief submitted by Mr. Frederick R. Coudert, Jr., discloses that the various points made by him are predictated upon the same assumption.

Now, inasmuch as we have shown, and as the evidence discloses, that this assumption is without foundation, it appears that the arguments contained in these briefs are immaterial.

That the defendant cannot glean from the plaintiff's evidence any facts to maintain this assumption is both natural and necessary. What did Mr. and Mrs. Underhill and their witnesses know? What could they prove with regard to the foundation stone of defendant's defense? They merely knew of rumors. They were aware of what occurred and of what they suffered from the arbitrary acts of the defendant. That was all.

Suppose they were not the parties imprisoned and that this action had been brought by a stranger who had proved the defendant's unlawful acts, and that the defendant in proving his case first called Mr. and Mrs. Underhill as witnesses to prove that he was a military commander acting for

the government of Venezuela, and that they knew no more concerning this fact than the record now discloses. Would such evidence be competent for the defendant on this issue? Is this the way to establish such an issue? Is not the only competent evidence for such a defense proof of a written commission or oral proof by officers of the government itself or at least some one having some knowledge of the fact, showing that Hernandez was acting for and under the authority of the government or revolutionary body?

It thus appears that the foundation of the entire edifice of the defendant's arguments is undermined and destroyed, and that necessarily the whole superstructure must perish with it.

It is clear that the Court below was in error. The plaintiff had made out a case which required countervailing evidence to overthrow it. The jury should have been the judges of the facts. A Court can only direct a verdict in cases where the plaintiff's competent evidence, direct and cross, makes out a complete defense for defendant or fails to make out a *prima facie* case for the plaintiff.

A case peculiarly in point is *Hickman vs. Jones*, 9 Wall., 197.

In this case a verdict had been directed for two of the defendants. The plaintiff, during the Civil War, had been indicted in a Court of the Confederate States and had been imprisoned upon the charge that he had traitorously co-operated with the troops of the United States and given them aid. After the War he brought suit against the officers composing the court and some of the grand jury and others.

This court held that the Confederate Court was a nullity and in discussing the question whether

the judge was right in directing a verdict for the defendants stated as follows:

> "There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned Judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court, and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken."

This Court, therefore, reversed the judgmen below and ordered a new trial.

In support of the above proposition the following cases were cited:

Aylwin vs. Ulmer, 12 Massachusetts, 22.
New York Fire Insurance Company, vs. Walden. 12 Johnson, 513.
Utica Insurance Company vs. Badger, 3 Wendell, 102.
Tufts vs Seabury, 11 Pickering, 140.
Morton vs. Fairbanks, Ib., 368.
Fisher vs. Duncan, 1 Hening and Munford, 562.
Schuchardt vs. Allens, 1 Wallace, 359.

See also to the same effect:

United States vs. Tillottson, 12 Wheat. 180.
Manchester vs. Ericsson, 105 U. S., 347.
Klein vs. Russell, 19 Wall., 433.
Moulor vs. Insurance Company, 101 U. S., 708.
United States vs. Chidester, 140 U. S., 49.

To authorize the direction of a verdict not only must the facts be undisputed, but the testimony must be so conclusive that a verdict in conflict with it would necessarily be set aside. *Phoenix Company vs. Doster*, 106 U. S., 30. In this case the court says:

> "The motion, at the close of the plaintiff's evidence, for a peremptory instruction for the company was properly denied. It could not have been allowed, without usurpation, upon the part of the court, of the functions of the jury. Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the

> principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion to set aside a verdict returned in opposition to it. *Greenleaf vs. Birth*, 9 Pet., 292; *United States vs. Laub*, 12 id. 1.; *Bank of the Metropolis vs. Guttschlick*, 14 id. 19; *Bevans vs. United States*, 13 Wall., 56; *Hendrick vs. Lindsay*, 93 U. S., 143."

See also *Connecticut Mutual Life Insurance Company vs. Lathrop*, 111 U. S., 619.

An instruction to find a verdict must be tested by the same rules as in the case of a demurrer to the evidence. Merrick's Executor vs. Giddings, 115 U. S., 300. In this case the Court says:

> "The instruction to find a verdict for the defendant must be tested by the same rules that apply in the case of a demurrer to evidence. *Parks vs. Ross*, 11 How., 263, 268; *Schuchardt vs. Allen*, 1 Wall , 359, 370.
>
> If, therefore, the facts established, and the conclusions which they reasonably justify, do not disclose a valid cause of action against the defendant, the judgment must be affirmed; otherwise reversed."

POINT II.

The judgment of the Courts below should be reversed and the case remitted to the United States Circuit Court for the Eastern District of New York for a new trial.

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Brief of Coudert & King for

Filed Mar. 4, 1895.

Supreme Court of the United States.

In the Matter of the petition of GEORGE F. UNDERHILL, for a writ of certiorari, &c., in the case of

GEORGE F. UNDERHILL,
Plaintiff,

AGAINST

JOSE MANUEL HERNANDEZ,
Defendant.

926

BRIEF FOR DEFENDANT.

Statement of Facts.

In the early part of the year 1892, a revolution broke out in Venezuela, which lasted until about October 6, of the same year. The principal parties to this conflict were those who recognized Palacio as their chief, and those who followed the leadership of Crespo. General Hernandez, the defendant in error, was one of the principal officers in the army under General Crespo, and commanded the District of Guayana, in which the City of Bolivar is situated. The party headed by Crespo was finally successful and entered the City of Caraccas on October 6, 1892 (Record, fol. 262). The Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the United States on October 26, 1892, and was at the time of the trial of this action the recognized government of that country (Record, fol. 340). It had been

recognized as the legitimate Venezuelan goverment by other foreign powers before that time.

In August, 1892, General Hernandez was in command of an army composed of the adherents of Crespo; his troops were encamped near the City of Bolivar. Sometime previous to this, an army, under General Santos de Carrera, composed of the adherents of Palacio, was sent out against General Hernandez. A battle between the two armies took place at Buena Vista, about seven miles from Bolivar, on August 8, 1892, in which the Carrera army was defeated and General Carrera killed. On August 13, General Hernandez entered Bolivar at the head of his troops, and at once assumed command of the city and surrounding district. Between the date of the battle of Buena Vista and General Hernandez' entry into Bolivar, all the officials of the city left the country, and the vacant positions were filled by General Hernandez (fol. 282 *et seq.*). There is no evidence of any conflict after this occupation of the city, nor any evidence that the appointees of General Hernandez are not still holding their offices.

At the time of the alleged grievance and for several years prior thereto, the plaintiff in error resided with his wife at Ciudad, Bolivar, in the Republic of Venezuela, where he was engaged in the management of the water works which supplied water to that city (see plaintiff's affidavit, p. 31). Some time after the entry of General Hernandez, Underhill *applied to him as the officer in command for a passport to leave the city.* General Hernandez refused this request, and also repeated requests made by others in his behalf, until October 18, when a passport was given by General Hernandez and the plaintiff left the country.

While one of the alleged grievances of the plaintiff in error consists of a charge of forced confinement in his own house, it appears that the house in which he resided belonged to the municipality (fol. 324). That the defendant in error desired possession of it for his troops, but upon plaintiff's persistent refusal to vacate, he abstained from using any force to secure entry in the premises. As an illustration of the singular for-

bearance which marked the defendant's conduct while in absolute and undisputed control, it is interesting to read plaintiff's testimony, when his anxiety to appear in a heroic role overcame his usual caution, as a witness in his case. "The General," he says, "sent to implore me to let him have the house. I told him 'No!' (see fols. 434 to 436). When it is found, in addition to this, that it was plaintiff's duty to supply the city with water, and that he deliberately refused to do so in writing, and declared that he would never again run the water works (Record, fol. 364), it becomes plain that all the trouble arose from the anxiety of General Hernandez to have the water supply continued, and that he was willing to allow the plaintiff, who was the contractor, to leave the house, if he would give security to satisfy him of his intention to return (see plaintiff's testimony, page 97, fol. 386 and following).

The plaintiff admits that General Hernandez was at the head of an army, and that General Santos Carrera went out with troops against him (Record, fols. 264–265). That there was a conflict between the two armies, and that in the conflict General Hernandez' army was successful, and General Carrera killed. The defendant entered the City at the head of an army (Record, fols. 282–283), and to use the plaintiff's language, he was "the Great Mogul" at the time. In all his subsequent interviews the plaintiff assumes that the defendant was the General in command, he so addresses him in the letter of September 24 (fol. 361), and he and his friends apply to him as an officer in authority who had the right to grant and refuse passports. And at folio 356 he says: "When General Hernandez came in, he assumed command. He assumed all the government authority therein."

The contention of plaintiff in error as presented to the trial Court below may be found at fol. 516 *et seq.*

The Court directed the jury at the close of the plaintiff's case to find a verdict for the defendant. Judgment was entered for the defendant upon this verdict and the case was removed to the Circuit Court of Appeals by writ of error.

The Circuit Court of Appeals affirmed the judgment appealed from upon the ground that the acts complained of were done by the defendant in the legitimate exercise of belligerent powers; that he was a military commander of an army in a civil war in Venezuela, and that his acts as such commander were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government. The Court of Appeals was also of the opinion that the evidence was not sufficient to have warranted a finding that the defendant was actuated by malice or any personal or private motive (Petition, p. 11).

The only question in the case, if there be any, is, how far was the defendant, while in the actual control of the Government, bound to give the plaintiff in error a passport without any condition or qualification whatever; that he was ready and willing to issue such a passport on certain terms of not impossible compliance is shown by the plaintiff himself. "If I had given this bail to go back he might have given me a passport, but I did not think he had the right to ask me that" (Record, fol. 390).

In Mr. Underhill's judgment it was "audacity" on General Hernandez' part to make such a request (fol.).

Points.

This Court has, in the case of Law Ow Bew (141 U. S., 583), and in re Woods (143 U. S., 202), passed upon the cases in which a writ of certiorari should issue under Sec. 6 of the Act of March 3, 1891, c. 517. This Court holds that *the power should be exercised sparingly*, and should be used only when the matter is of sufficient importance in itself, *and sufficiently open to controversy to make it a duty of this Court to issue the writ applied for.* This must be so when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this Court of the oppres-

sive burden of general litigation, which impeded the examination and disposition of cases of public concern and delayed citizens in the pursuit of justice.

There is no principle of law involved in this case open to controversy.

This is an attempt to hold the defendant in the Courts of this country for his acts as a military commander of an army in Venezuela, while representing a *de facto* Government in the prosecution of a war, which Government has since been recognized by the United States as the legitimate Government of Venezuela. The Circuit Court of Appeals held that the defendant's acts as such military commander could not be made the subject of inquiry in a civil action in the Courts of this country. This proposition of law, so well sustained by the reasoning of the able opinion of that Court, and by the authorities therein cited, is no longer open to controversy. It has the support not only of the decisions of this Court but of the Courts of England and of the opinions of writers on international law.

This Court has passed upon the question in the following cases:

Lamar *v.* Brown, 92 U. S., 187;
Williams *v.* Bruffy, 96 U. S., 185;
Coleman *v.* Tennessee, 97 U. S., 509;
Ford *v.* Surget, 97 U. S., 594;
Dow *v.* Johnson, 100 U. S., 158;
Freeland *v.* Williams, 131 U. S.

All these cases arose during the rebellion, and either involved injuries to the person or property of our own citizens or the acts of officers of the Confederate army.

Ford *v.* Surget, *supra*, seems to be one of the strongest cases against the contention of the plaintiff in this action. In that case the defendant was an officer of the Confederate army and as such destroyed cotton belonging to others to prevent it falling into the hands of the United States. Thus we have

a case where the acts were committed in the course of an *unsuccessful rebellion* and by *the officers of an army of the enemy* of our country. This Court held that the acts complained of were acts of war on the part of the military forces of the rebellion, for which the person executing such orders was relieved from civil responsibility. This Court also held that the only question to be determined in such cases was simply whether there was a war and not whether it was successful. "The Confederate Government is to be regarded by the Courts as simply the military representative of the insurrection against the authority of the United States. To the Confederate army was, however, conceded, in the interests of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other—that concession placing the soldiers and officers of the rebel army as to all matters directly connected with the mode of prosecuting the war on the footing of those engaged in lawful war and exempting them from liability for acts of legitimate warfare."

In the case of Dow *v.* Johnson, *supra*, the action was brought on a judgment recovered against General Dow in the civil courts of Louisiana for goods belonging to the plaintiff Johnson, a *citizen and resident* of New York, while the southern portion of Louisiana was in possession of the Union army. It was claimed also that the acts of the defendant were malicious. This Court held that the courts of Louisiana had no jurisdiction to entertain such an action; that the judgment was void. The proposition of law is thus laid down: "An officer of the army of the United States while serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts, *nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military ne-*

cessity. He was subject to the laws of war and amenable only to his own government."

This Court says in the more recent case of Freeland *v.* Williams, *supra*, at page 416: "Ever since the case of Dow *v.* Johnson, 100 U. S., 158, the doctrine has been settled in the Courts that in our late civil war each party was entitled to the benefit of belligerent rights, as in the case of public war, and that for the act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority."

The same questions were involved in Lamar *v.* Browne, *supra*, and Coleman *v.* Tennessee, *supra*, and the same conclusion reached.

The opinion of Judge Wallace attached to the petition cites numerous cases and authorities which show that the decisions of this Court are in accordance with the known and settled principles of international law, or, more properly speaking, of the law of nations.

It is a principle of the law of nations that when an act is performed by a person in the exercise of public authority he cannot be held responsible for the results of such an act in the courts of any foreign country. Thus, Westlake (Private International Law, 3 ed., §190) says: "Foreign states, and those persons in them who are called sovereigns, whether their title be Emperor, King, Grand Duke or any other, and whether their power in their states be absolute or limited, cannot be sued in England on their obligations, whether *ex contractu*, *quasi ex contractu*, or *ex delicto*." The same rule is laid down in Hall on International Law, § 102, as particularly applicable to officers in command of the armies of a foreign state, and their subordinates.

The Courts of England have in several important cases considered this subject and reached the same conclusion as this Court.

The leading case there is the Duke of Brunswick *v.* The King of Hanover, 2 House of Lords Cases, 1. The defendant, though the King of Hanover, was

a British subject, but the acts which the plaintiff complained of were done by him in his official capacity. The Court in holding that the action could not be maintained, says, the Lord Chancellor delivering the opinion :

" A foreign sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country, whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a sovereign effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of the authority vested in him as sovereign. * * * It is true the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but notwithstanding that it is so stated, still *if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it.*"

Judge Wallace, in his opinion, cites also the cases of Moondalay *v.* Morton, 1 B. C. C., 469; Nabob of Arcot *v.* The East India Company, 4 B. C. C., 180, in which the same conclusion was reached.

Before this Court was called upon to decide the question involved in the case the law officers of this government had advised the executive department, and admitted to the representatives of foreign government that the official acts of the representative of a foreign government could not be made the subject of inquiry by our tribunals, and that our courts, upon being advised of the nature of such an action, would dismiss the suit if a civil action, or discharge the accused if held on an indictment.

Bradford, 1 Op., Atty.-Genl., 45, 46;
Lee, Atty.-Genl., 1 Op. Atty.-Genl., 81;
Webster, Atty.-Genl., in McLeod case, Vol. 5, Webster's Works, p. 129;

This principle is so well established by reason and

authority that it certainly cannot be regarded as requiring further discussion, and was regarded by the Circuit Court of Appeals as being decisive of the case.

While the petitioner seems to concede this position, he contests what he terms the second position of the Circuit Court of Appeals, viz.: that the success and final recognition of the revolutionary party legalized its prior acts irrespective of any recognition of belligerent rights. This question was not involved in this case, as it was admitted that the Crespo government was finally successful; that it became and now is the legitimate government of the Republic of Venezuela, and was recognized as such by the United States before the commencement of this action.

This Court has also passed upon this question in the case of Ford *v.* Surget, *supra*. There the defendant was an officer of an army of an unsuccessful party which had never been recognized by this Union as being an independent nation or otherwise than as rebels against the parent government. This Court held that the officers of such an army were entitled to the same immunity in civil actions as the officers, and that the Confederate Government was a *de facto* government within the meaning of such term as used by writers on international law. See also Coleman *v.* Tenessee, *supra*.

This Court has also passed upon the status of a revolutionary party which has been finally successful, in Williams *v.* Bruffy, 96 U. S., 185.

"The validity of its acts, both against the present State and the citizens, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts, *from the commencement of its existence*, are upheld as those of an independent nation. Such was the case of the State Governments under the old confederation on their separation from the British crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged.

Confiscations, therefore, of enemy's property made by them were sustained as if made by an independent nation."

By the success of the Crespo party, its acts from the time of the initiation of the hostilities against the Palacio party became valid *ab initio*. Thus its success made it the legally constituted government of Venezuela during the time the petitioner claims he was imprisoned. No action can be maintained on the ground that the Crespo party improperly secured control. It is for the people of Venezuela to determine for themselves who shall control their government, and not for the courts of a foreign country, as stated in Hatch and Baez, 7 Hun (N. Y.), 596: "The courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its territory."

In support of his position, that as to the effect of the success of a revolution, there is a conflict of opinion between different Circuit Courts of Appeal, the attorney for the petition cites:

The Itata, 56 Fed. Rep., 505;
U. S. v. *Trumbull*, 48 Fed. Rep., 99;
The Ambrose Light, 25 Fed. Rep., 408;

In none of these cases was the question in this case involved. Only one of these cases was in the Circuit Court of Appeals, the *Itata*. All these cases turned upon a statute and involved the question whether the neutrality laws of the United States had been violated, and in each of these cases the Court held that the evidence did not warrant the Court in holding that the statute, Rev. Stat. §5283, had been violated. In the *Itata* case the counsel devoted some time to the discussion of the effect of a recognition of a revolutionary party, but Judge Hawley in the opinion of the Court says: "Having reached the conclusion that the evidence in this case is not sufficient to justify a decree of forfeiture against the *Itata*, it is unnecessary to discuss the effect of the subsequent recognition by the United States of the provisional

government of Venezuela as the lawful government of Chili, and upon that question we express no opinion."

It is not necessary here to argue that results of grave moment might follow the adoption of a contrary rule to that which has heretofore been followed by the Courts of this country, both Federal and State. It happens that we are dealing with a younger member of the family of American States, one, too, which might not be able successfully to resent a wrong inflicted by one of the great nations of the world. The learned counsel for the plaintiff in error is quite conscious of this, and indulges in a form of rhetorical appeal, which would probably not be used if the Republic of Venezuela had been more formidable in territory and in numbers than it actually is; but he can hardly have expected, even when disturbed by the misleading influences of extraordinary professional zeal—to deflect the judgment of this Court from the solemn exercise of its great functions. A suggestion that the Republics of South America are to receive different treatment from the leading Governments of the world, because in the counsel's judgment they may be only uncivilized or half civilized nations, does not of course deserve serious consideration, any more than the singular plea that being a Christian nation we must extend a different rule to South American "adventurers," from that which would justly apply to successful military men who in the Counsel's opinion may not be open to that disparaging epithet. Even "Russian usurpers" find no mercy in his indiscriminating eloquence, and our nation must, in order to preserve its high character for Christian excellence, pass upon the validity of the usurper's title, and punish his agents for accomplishing the nefarious purposes of their Master (page 7 of brief of Plaintiff's Counsel). And yet the learned counsel had before him when he thus declaimed, the instructive language of this Court:

"Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdic-

tion, they they would always be supplied in every variety of form. An inhabitant of a bombarded city would have little hesitation in declaring the bombardment unnecessary and cruel."

(Dow *v.* Johnson, *supra*, p. 165.)

This case was correctly decided by the Circuit Court of Appeals following the decisions of this Court. All the questions involved having been disposed of by the decisions of this Court cited above, the petition for a writ of certiorari should be denied.

F. R. COUDERT,
JOSEPH KLING,
Of Counsel.

GEORGE F. UNDERHILL,
Plaintiff in Error,

vs.

JOSÉ MANUEL HERNANDEZ,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FREDERIC R. COUDERT, Jr.,
Of Counsel.

NEW YORK:
THE EVENING POST JOB PRINTING HOUSE, 156 FULTON STREET.
(EVENING POST BUILDING.)
1897.

Supreme Court of the United States

GEORGE F. UNDERHILL,
Plaintiff in Error,

AGAINST

JOSE MANUEL HERNANDEZ,
Defendant in Error.

Brief on Behalf of Defendant.

Statement.

Plaintiff sought in the Supreme Court of the State of New York to recover damages against defendant for alleged false imprisonment and technical assault, charged to have been committed at the city of Bolivar, in the Republic of Venezuela. The action was removed to the United States Circuit Court.

When it appeared on the trial that the acts complained of had been done by order of the defendant while he was in command of an army in military occupation of the city of Bolivar, in the course of a revolution in Venezuela, the court ordered a verdict for defendant.

On appeal to the Circuit Court of Appeals the judgment entered on the verdict was affirmed.

The grounds for the ruling of the trial court and for the affirmance of the judgment are very clearly stated in the direction of the Circuit Judge at folio 134, and in the Opinion of the Circuit Court of Appeals at folio 148.

Facts.

It appeared from the evidence introduced by the plaintiff that a revolutionary movement throughout the State of Venezuela began in the spring of 1892; the subject of the conflict was the legal incumbency of the Presidency of the Republic, Mr. Palacio holding on to the Presidency after the expiration of his term of office, and the insurgents, or 'Legalists' as they were called, resisting this attempt.

> "General Crespo was the revolutionary or "opposition party against the then present "government" (fol. 66).
>
> "There were two parties to this revolution— "the Palacio people and the Crespo people, "as far as I know. * * * One party was "the Palacio party * * * and the other, "the Crespo party, of which General Hernan- "dez was one. * * * I believe the fight "was between the government and Crespo "really. Crespo was finally recognized by the "United States as representing the authority "in October; the revolution had lasted way "back from the summer. I do not know the "ground of the revolution and why General "Hernandez, Crespo and the others called "themselves 'Legalists' or representatives "of the law" (fol. 84).
>
> "Crespo and Hernandez with him were the "rebels (fol. 86).
>
> "They told me that Congress was against "Palacio. Congress can put any man there "(fol. 87)."

It further appeared that in the course of this revolution General Carrera went out from Bolivar with troops against Hernandez; a battle was fought at Buena Vista, seven or eight miles from Bolivar. This was on the 10th of August (fols. 67 and 108).

On the 13th of August, Hernandez came into Bolivar "at the head of the army." The army was uniformed, especially by white muslin bands on their hats with the words "El Legalista" (fols. 71, 73, 115 and 120). From that time Hernandez was in complete control of the city, and, to use the plaintiff's expression, "He was the Great Mogul" (fol. 72).

Authority had been organized, called the provisional government, and made up of Hernandez's officers. Hernandez assumed command and all government authority; he was the only constituted authority in the place (fol. 89).

He was the only man in town in power (fol. 93).

> "He was the only authority in Bolivar. * * "The prefect ran away. * * The Custom "House had run away. I suppose the judges "had all taken flight, etc. (fol. 96)."

He was addressed as "Civil and Military Chief." His letters were so stamped (fols. 78-92, 106-107).

It was to him that plaintiff applied for a passport, which he had power to give (fols. 98, 115). All the officials had escaped; there was no authority left--"chaos and anarchy." Hernandez was the only person from whom plaintiff expected to get redress for wrong (fol. 84).

Hernandez appointed judges (fols. 100 and 112). He appointed the Prefect of the town (fol. 116). He "appointed everything—the President of the city, the local government" (fol. 106); he prescribed general rules refusing access to the town after eight P. M. (fol. 125), and was appealed to for protection and safe conduct even by the captain of a British vessel in the port (fol. 128).

The revolution succeeded, and Crespo entered Caracas on the 6th of October, 1892 (fol. 66). His

Government was formally recognized on the 23d day of October, 1892 (fol. 61; Foreign Relations, 1892, 631-636).

Under the circumstances, and possessing this complete and unquestioned *de facto* authority, Hernandez exercised this authority over the defendant, a permanent resident of the city of Bolivar, and the builder and operator of its waterworks (fol. 61). He feared that the operation of the waterworks would be discontinued and exacted bail of the plaintiff before granting him a passport to leave the city (fols. 75 to 78, 97-98). Plaintiff had written to Hernandez as "Civil and Military Chief," that he would never run the aqueduct for the city of Bolivar again (fols. 91, 92 and 93). Plaintiff complains of his detention in the house he occupied, and yet he testifies that Hernandez wanted the house for his troops; it belonged to the municipality (fol. 82), and Hernandez asked him to vacate it, which he refused to do. He adds:

> "He was the Grand Mogul. *Had the power*
> "*to put me out by force of arms.* He could
> "not get in—not unless they went over the
> "fence. We would have stayed there. *If he*
> "*got me out of that house he would have had*
> "*to put me out by force.* He did not put me
> "out. He made several demands. * * He
> "sent to implore me to let him have the house.
> "I told him no (fol. 109)."

Hernandez required a mule for his military purposes, and yet he "*entreated*" for it and was refused, and only after several attempts, took it for two days and returned it (fols. 116-117).

All the testimony shows unusual consideration on the part of Hernandez, who was confessedly in the exercise of the unlimited power of a commander in control of a conquered town.

No shadow of malice was suggested by the testi-

mony; nothing but the prudent caution of a man upon whom circumstances had devolved responsibility for the safety of a city and a population placed under his care by the chances of war.

Points.

The propositions upon which rests the soundness of the judgment now under review and which defendant in error is prepared to maintain, are:

I.—The jurisdiction of the court below, and the liability of the defendant in the present action, depend upon international law.

II.—International law protects from inquiry in the courts of a foreign jurisdiction acts of a government done within its own territory.

III.—This exemption from review by municipal courts extends to all governmental authority, *de facto* as well as *de jure*, and to its agents, whether civil officers or military commanders.

IV.—The facts in the present case establish beyond question that the defendant was a military commander, a *de facto* authority, and that all the acts complained of were done in that capacity.

I.

The Jurisdiction of the Court below, and the Liability of the Defendant, depend upon International Law.

This has been not only admitted, but claimed by the plaintiff in error. He has insisted, and correctly, that the municipal law of Venezuela affords redress for assaults, &c., and farther that international law is by the Venezuelan Constitution made a part of its municipal law.

He further insists that under international law the defendant would be held guilty of tortious acts against the plaintiff, and as tort follows the person, the tort feasor may, under the sanction of international law, be brought under the jurisdiction of the municipal courts of New York whenever found within its territory, and under that law be held in damages.

It may therefore be assumed that international law is of universal obligation (The *Scotia*, 14 Wall., 170); that it is part of the law of the land where any question arises which is properly the subject of its jurisdiction (Blackstone, Book IV., chap. 4), and that it is the only law which can be applied to foreigners with reference to acts done without the realm (Le Louis, 2 Dod's. Adm., 239).

II.

International Law protects from Inquiry in the Courts of a Foreign Jurisdiction Acts of a Government done within its own Territory.

"The courts of one country are bound to abstain

" from sitting in judgment on the acts of another " government, done within its own territory."

Hatch vs. *Baez*, 7 Hun, 596.

A vessel having been seized under a decree of the French Government which admittedly violated the rights of neutrals, was libelled by the original owners at the port of Philadelphia. Mr. Dallas, then U. S. attorney resisted the libel saying:

> " We do not justify the decree, but we say " that whatever is done by a sovereign in his " sovereign character, it becomes a matter of " negotiation, or of reprisals, or of war, accord- " ing to its importance."

The Supreme Court dismissed the libel on the ground that the vessel was at the time, " a public vessel belonging to a sovereign, and employed in the public service."

The Exchange, 7 Cranch., 116.

This refusal to take jurisdiction of such cases is " a consequence of the absolute independence " of every sovereign authority, and of the in- " ternational comity which induces every sov- " ereign State to respect the independence of " every other sovereign State."

Mighell vs. *Sultan of Jahore*, 63 L. J. R., N. S. (Part II), 593.

See also

DeHaber vs. *Queen of Portugal*, L. R., 20; Q. B., 488.

Varasseur vs. *Krupp*, L. R., Ch. Div., 35.

Westlake Priv. Int. Law, § 190, p. 226 (3d Ed.).

The doctrine has been carried to the exemption

from seizure of a Belgian vessel belonging to the Government and carrying the mails, although she also carried passengers and merchandize for pay.

Le Parlement Belge, 5 P. D., 197.
Briggs vs. *Lightboats*, 11 Allen, 157.
In re Mehemet Ali, Calvo Droit Intl. III., 289.

"If it is a sovereign act, then whether it be ac-
"cording to law, or not according to law, we can-
"not inquire into it."

Duke of Brunswick vs. *King of Han over*, 2 H. L. Cases, 1-16-21.

III.

This Exemption from Review by Municipal Courts extends to all governmental Authority, de facto as well as de jure, and to its Agents, whether Civil Officers or Military Commanders.

A.—"The immunity of individuals from suits
"brought in foreign tribunals for acts done
"within their own States, in the exercise of the
"sovereignty thereof, is essential to preserve the
"peace and harmony of nations."

Hatch vs. *Baez*, *supra*.

Hence the exemption must of necessity apply to all "political authority, whether vested in a single individual or in a number of individuals," for, as Halleck observes, such political authority "is properly the sovereignty of the State."

Halleck Int. Law, pp. 63-64.

It applies to a person acting under a commission from authority.

> Lee, Atty. Gen'l *in re Sinclair*, 1 Op. Atty. Gen'l, 81.

> "The extent of his authority can with pro-
> "priety or convenience be determined only by
> "the constituted authorities of his own nation."

> Bradford, Atty. Gen'l, *in re Collet*, 1 Op. Atty. Gen'l, 45-46.

This follows from the admitted fact that every independent State may adopt whatever political institutions and whatever rules it may please without the interference of any foreign power (Phillimore, Int. Law, p 216).

The immunity springs from the capacity in which the act is performed (Hatch *vs.* Baez; Duke of Brunswick *vs.* King of Hanover, *supra*), and it extends to any public act of persons in a foreign service.

In the *Case of McLeod*, Webster's Works, V., 129, the right was claimed by the courts of the State of New York to put McLeod on trial for murder, on account of an act performed while a member of the British forces in Canada, and the danger that the assertion of such a right might at any time precipitate the nation into an international conflict unless the Federal authorities could set it at naught, procured the enactment by Congress of the statute (*Rev. Stat.* § 753), providing for a writ of *habeas corpus* from the Federal courts on behalf of any foreign subject or citizen in custody for an act done

> "under any alleged right, title, authority

> "* * * claimed under the commission, or "order, or *sanction* of any foreign State, or "*under color thereof*, the validity and effect "whereof depends upon the law of nations."

The principle of the exemption could not be more completely nor more tersely stated than in the language of this statute, nor could it more plainly embrace the case at bar.

B.—The immunity extends to *de facto* authorities, and to military rule.

A place captured by the enemy and remaining in his possession, under the command and control of his military forces, enables the enemy "to exercise *the fullest rights of sovereignty* over that place." By the surrender the inhabitants pass under a temporary allegiance to the conqueror and are bound by such laws—and such laws only—as he chooses to impose on them.

> "No other laws could be obligatory upon "them, for where there is no protection or al- "legiance or sovereignty, there can be no claim "to obedience" (4 Wheat., p. 254).

Applying this principle to the temporary occupation of the port of Castine in Maine by the British forces during the war of 1812, this Court refused to sanction the collection of custom duties on goods imported into Castine during such temporary military occupation.

U. S. vs. *Rice*, 4 Wheat., 247.

The same principle was again asserted by this Court with reference to the temporary occupation of Tampico by American troops in the Mexican war.

> "When Tampico had been captured and the "State of Tamaulipas subjected, other nations

"were bound to regard the country while our "possession continued as the territory of the "United States and to respect it as such. For "by the laws and usages of nations, conquest "is a valid title while the victor maintains the "exclusive possession of the conquered coun- "try."

Fleming vs. *Page*, 9 How., 615.

See also

Cross vs. *Harrison*, 16 How., 164, 190.

"The conquering power has a right to dis- "place the pre-existing authority and to as- "sume to such extent as it may deem proper "the exercise by itself of all the powers and "functions of government. It may appoint all "the necessary officers and clothe them with "designated powers, larger or smaller, accord- "ing to its pleasure. It may prescribe the "revenues to be paid, and apply them to its "own use or otherwise. It may do anything "necessary to strengthen itself and weaken "the enemy. There is no limit to the powers "that may be exerted in such cases, save "those which are found in the laws and usages "of war."

New Orleans vs. *Steamship Co.*, 20 Wall., 394.

These are the attributes of *sovereignty;* no less complete and no less entitled to respect by other nations because they are *de facto* and not titular; because they are transitory and have no duration beyond the period of military occupation.

These were the powers exercised by General Hernandez during his occupation of Bolivar from the 10th of August, 1892, to the successful termination of Crespo's revolt against the usurpation of Palacio, and the extent of his authority as well as the necessity for its exercise should properly be determined by his superiors in his own nation.

The doctrine set forth in *U. S.* vs. *Rice* and *Fleming* vs. *Page*, *supra*, was again laid down by this Court, and applied to the authority of the Confederate States:

> "From a very early period of the Civil War "to its close it was regarded as simply *the* "*military representative* of the insurrection "against the authority of the United "States" (9).

This class of government, the Court continues, is:—

> "Called by publicists a government *de facto*, "but which might perhaps be more aptly de- "nominated *a government of paramount* "*force*. Its distinguishing characteristics are "(1) That its existence is maintained by "active military power, within the territories "and against the rightful authority of an "established and lawful government; and (2) "that while it exists it must necessarily be "obeyed, &c. * * * They are usually ad- "ministered directly by military authority."

After citing the examples of the military occupation of Castine and Tampico, the Court says:

> "We think that it must be classed among "the governments of which these are ex- "amples." * * *
>
> "To the extent, then, of *actual supreme-* "*acy, however unlawfully gained*, in all "matters of government *within its military* "*lines*, the power of the insurgent govern- "ment cannot be questioned."
>
> *Thorington* vs. *Smith*, 8 Wall., 9–10–11.

To the same effect as to belligerency being accorded to the Confederate Government only in its *military character*, and yet that such

> "concession placed its soldiers and military

> " officers in its service on the footing of those
> " engaged in lawful war, and exempted them
> " from liability for acts of legitimate war-
> " fare."
>
> *Williams* vs. *Bruffy*, 96 U. S., 187.

The same ruling and the same distinction as to the belligerency accorded to the "Confederate Army" and exemption from liability for all acts of legitimate warfare, while repudiating all "legislation" of the Confederacy as an unrecognized and unsuccessful rebellion, are again laid down in

Ford vs. *Surget*, 97 U. S., 604-605.

C.—That military commanders, even those acting under such a modified *de facto* government as that of the Confederacy, are exempt, under the principle stated, from inquiry into their acts by the municipal courts, has been thoroughly established by this Court.

Where a Confederate soldier was sued in the courts of West Virginia in trespass for the taking and conversion of plaintiff's cattle, and it appeared that he was a Confederate soldier and seized the cattle under the order of his commanding general, this Court sustained a judgment exonerating him from liability, and said:

> " It is not here denied that the doctrine of
> " *Dow* vs. *Johnson* is correct and that parties
> " are protected by that doctrine from civil
> " liability for any act done in the prosecution
> " of a civil war."
>
> *Freeland* vs. *Williams*, 131 U. S., p. 417.

The doctrine of Dow vs. Johnson thus affirmed, and applied to the protection of members of the Confederate forces, is that an officer serving in an

enemy's country is not liable to an action in the courts of that country for injuries resulting from acts ordered by him in his military capacity "*upon an allegation of the injured party that the acts were not justified by the necessities of war*" (p. 163). It was also there held that :

> "This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army when in Pennsylvania as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether these acts resulted in the destruction of property or the destruction of life ; *nor could they be required by these tribunals to explain or justify their conduct* upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war."
>
> *Dow* vs. *Johnson*, 100 U. S., 158, at page 169.

This doctrine, now so firmly established that not only need no further authorities be cited in its support, but apology may be in order for the copious citations already made, is founded in reason and based on the necessities of military exigency.

It is manifest that to require officers and soldiers to hold themselves in readiness to obey the summons of every local tribunal, and to make them amenable to all the judgments, pains and penalties with which such tribunal might visit them whenever dissatisfied with their explanations of their conduct, or in disagreement with them as to the exigencies of the occasion, would utterly destroy the efficiency of any army as a hostile force (Ford *vs.* Surget, 100 U. S., p. 165).

Hence military commanders must be allowed to govern by military law; and what is military law ?

"Martial law has been defined to be the will "of the commanding officer of an armed force, "or of a geographical military department, ex- "pressed in time of war within the limit of his "military jurisdiction, as necessity demands "and prudence dictates, restrained or enlarged "by the orders of its military chief or supreme "executive ruler.....Martial law is founded "on paramount necessity. It is the will of the "commander of the forces. In the proper "sense, it is not law at all. It is merely a ces- "sation, from necessity, of all municipal law, "and what necessity requires it justifies.

Wheaton Int. Law, p. 470 (3d Eng. Ed).

"It overrules, suspends and replaces the "civil law and civil tribunals. It is from its "very nature an arbitrary power and extends "to all inhabitants of the district where it is "in force."

Halleck Int. Law, p. 373 (Ed. 1861).

"It suspends, for the time being, *all the "laws of the land*, and substitutes in their "place *no law*, that is the mere will of the "military commander."

Cushing, Atty. Genl., 8 Op, Atty. Genl., 365.

"A general principle of military law is that "no acts of military officers or tribunals, "within the scope of their jurisdiction, can "be revised, set aside, or punished, civilly or "criminally, by a court of common law. "Another principle of law is that offenses "committed by persons in the military ser- "vice during the time of war, insurrection "or rebellion, are punishable only by military "tribunals."

In re Ezeta, 62 Fed. Rep., 1003.

Review of Plaintiff's Authorities.

A brief review of plaintiff's positions and the authorities cited may here be in order, before closing the presentation of defendant's case.

(1.) To support his contention that military officers are amenable to civil suits for their actions in war he cites:

Luther vs. *Borden*, 7 How., 45, the only question decided in this case was that no courts had jurisdiction to determine which of two organizations constituted the lawful government of a State; that such a determination was political and was properly the function of Congress or the Executive, whose decision on the subject the courts must follow. Hence, the court below having refused to receive evidence offered by plaintiff to show that defendants, who had caused his arrest under color of authority from a State government, did not represent the only constituted government, the ruling was sustained and judgment directing a verdict was affirmed.

Mitchell vs. *Harmony*, 13 How., 115, plaintiff was trading under protection of the flag, under sanction of the commander, and by permission of the Government.

He was not, therefore, in illicit trade with the enemy, and the officer had no right to seize the property for an act duly authorized by the competent authorities.

Raymond vs. *Thomas*, 91 U. S., 712, simply held that General Canby had no right by a military order to annul a decree of a court of competent jurisdiction. No question of his liability arose. In Ford *vs.* Surget the court held that the act ordering the burning of cotton could have

no force as legislation, but that the orders under which the officers burnt the cotton, as an act of war exempted from all liability those who executed them (97 U. S., 59, 14).

Planters' Bank vs. *Union Bank*, 83 U. S., 483, to same effect.

Ex parte Milligan, 71 U. S., 2; *Smith* vs. *Shaw*, 12 Johns., 257; *McConnell* vs. *Hampton*, 12 Johns., 254, held that civil tribunals being open military arrests were unauthorized and illegal.

But not that the military commanders were liable in damages.

Beckwith vs. *Bean*, 93 U. S., 266, was an action against a Provost Marshal in Vermont. *There was no war in Vermont.* The Supreme Court sustained a denial of a nonsuit because "*there were many disputed facts disconnected from any* question as to the authority derived from the President.

On the other hand, we find in one of these authorities, (Luther *vs.* Borden, *supra*), the following significant language apposite to the present case:

> "It was a state of war: and the established
> "government resorted to the right and usages
> "of war to maintain itself and to overcome
> "the unlawful opposition (2 Black, 697), and
> "in that state of things the officers engaged in
> "its military service might lawfully arrest any
> "one. * * *
>
> "Without the power to do this, martial law
> "and the military array of the government
> "would be mere parade and rather encourage
> "attack than repel it."

(2.) To support his contention that defendant cannot make good his defense that in all the acts complained of he acted in the capacity of a military

commander, because the government or authority in whose behalf he commanded was only recognized by the United States some months after the occurrences complained of, he cites

Kenneth vs. *Chambers*, 14 How., 38.

This was a suit in equity to enforce a contract made by a citizen of the United States to provide arms and ammunition to a resident of Texas, for use against the Republic of Mexico, in the Texas insurrection.

The right to recover was denied on the ground that the contract was *in violation of the laws of the United States, in violation of the treaty with Mexico*, and against public policy. The subsequent success of the Texan insurrection and the incorporation of Texas into the Union did not alter or in any way affect the fact that the contract when made was void and no rights could be predicated of it.

He cites further the cases of

The Ambrose Light, 25 Fed. Rep., 408.
The Conserva, 38 Fed. Rep., 431.
The Itata, 56 Fed. Rep., 505.
U. S. vs. *Trumbull*, 48 Fed. Rep., 99.

In the first of these cases a vessel commissioned by Colombian revolutionists was seized by one of our naval squadron for not having a proper commission and libelled for condemnation under the law of nations as prize.

No recognition of belligerency having been accorded the revolutionists: held, they could not grant a commission which foreign nations were bound to recognize; this on the ground that maritime warfare with its incidents of blockade and right of search imposes burdens and restrictions

upon other nations, and the right to wage it is therefore restricted by international law to recognized sovereignties in the family of nations and denied to revolutionary *de facto* powers, yet unrecognized as belligerents. It is, therefore, the right of other nations, under international law to protect themselves against the burdens of maritime warfare so waged and to treat its participants as pirates.

It was also held, that in the absence of any commission from recognized belligerents the vessel was lawful prize as being engaged on a piratical expedition.

BUT HELD FURTHER, that by a communication from the Department of State on the day of the seizure, our Government having refused to recognize a decree of blockade by the Colombian Government or any other than "*an effective blockade*," this was an implied recognition of the existing insurrection as constituting a state of civil war, and assumes that the revolutionists hold those ports as a *de facto power*, and that in respect to such ports the Colombian Government is a *belligerent*. Hence, that the vessels of the revolutionists could not be regarded as piratical, and *condemnation was denied*.

This, also, in face of a communication from the State Department long after the refusal to recognize the blockade (April 24–July 1, 1885), to the effect that

> "a state of war had not, in a formal sense,
> "either before or after April 20, 1885, been
> "recognized by the Government of the United
> "States as existing in the United States of Co-
> "lombia; nor have the insurgents now in arms
> "against the latter government been recog-
> "nized by the United States as belligerents,
> "nor, so far as advised, by the United States
> "of Colombia."

The communication of April 24, 1885, declared that

> "Vessels manned by parties in arms against
> "the government, when passing to and from
> "ports held by such insurgents, or even when
> "attacking ports in possession of the Colom-
> "bian Government, are not pirates by the law
> "of nations, and cannot be regarded as pirates
> "by the United States."

The Conserva, 38 Fed. Rep., 431, was simply to the effect that no prosecution under the neutrality laws could be sustained for the sending of arms, etc., to either of two Haytien revolutionary factions, neither of which had been recognized as governments or belligerents by the United States Government.

U. S. vs. *Trumbull*, 48 Fed. Rep., 99, arose out of the furnishing of arms and ammunition to the *Itata*, fitted out by the "Congressional Party," revolutionists against the Government of Chili, in 1891.

The only question decided was that the furnishing of arms did not contravene the statute of the United States against fitting out expeditions, etc.

At pp. 104–105 the Court cites Secretary Fish's despatch concerning vessels in the service of the Haytien insurgents (1869) to the same effect as the remarks (*supra*) *in re Ambrose Light*, *i. e.*, the Government of Hayti may regard the insurgents as pirates.

> "How they are to be regarded by their own
> "legitimate Government is a question of munici-
> "pal law, into which we have no occasion, if we
> "had the right, to enter.
> "Regarding them as simple armed cruisers of
> "the insurgents, not yet acknowledged by this
> "Government to have attained belligerent rights,
> "it is competent for the United States to deny
> "and resist the exercise by those vessels, or any

"other agent of the rebellion, of the privileges "which attend maritime war in respect to our "citizens or their property entitled to their pro- "tection" (3 Whart. Int. Law Dig., 465-466).

The Itata, 56 Fed. Rep., 505, was tried on the same facts as U. S. *vs.* Trumbull, and involves the same points.

By reason of the inconvenience and danger to neutrals attendant upon maritime warfare, in view of the latitude allowed in the capture of enemy's private property on the high seas, the laws of prize are necessarily more strict than the rules relating to the recognition of belligerency on land and within the territory of the combatants.

Prize laws are property laws, of universal recognition, and from the act of capture rights of property flow and title to property is affected.

Rights of captors depend upon the status at the moment of capture and that status depends upon the degree of sovereignty or national authority required by the prize laws to clothe the hostile vessel with immunity.

The cases cited by the plaintiff are governed by the usual rules applicable to contracts, the validity of which is always to be tested by the law in force at the time of their execution, or by the rules applicable to cases of maritime warfare by which all nations are exposed to loss and injury.

We believe that an examination of them must dispose of the claim that military commanders are liable for acts done within the territory subject to their command until recognition of their belligerency or nationality by some foreign government, but it may yet be permissible to add a few affirmative authorities on the proposition that subsequent ratification, success and recognition cover revolutionary acts previously done.

The sovereign may ratify hostile proceedings of

a subject, the capture of property, &c., and thus by a retroactive operation give validity to them.

Brown vs. *U. S.*, 8 Cr., 131-32-33.
(Cited in *Prize Cases*, 2 Black, p. 671.)

"The objection to this act of ratification that "it is *ex post facto*, and therefore unconstitu- "tional and void, might possibly have some "weight on the trial of an indictment in a "criminal Court. But precedents from that "source cannot be received as authoritative "in a tribunal administering public and inter- "national law."

Prize Cases, 671.

"Changes attempted by small or doubtful "majorities, it must be conceded, will be "at their peril, as they will usually be resisted "by those in power by means of prosecutions "and sometimes by violence, and, *unless "crowned by success*, and *thus subsequently "ratified*, they will often be punished as re- "bellious or treasonable."

Luther vs. *Borden*, 7 How., 56 (Dissenting Opinion).

"The other kind of *de facto* government "to which the doctrines cited relate, is such as "exists where a portion of the inhabitants of "a country have separated themselves from "the parent State and established an inde- "pendent government. * * *

"*If it succeed and become recognized, its "acts from the commencement of its existence* "are upheld as those of an *independent "nation.*

Williams vs. *Bruffy*, 96 U. S. 186.

"Those who engage in rebellion must con- "sider the consequences. *If they succeed, "rebellion becomes revolution, and the new "government will justify its founders.*"

Shortridge vs. *Mason*, Chase's, Dec., 136

This brings us to the consideration of our last premise, to wit:

IV.

The Facts in the present Case establish beyond question that the Defendant was a Military Commander, a De Facto Authority, and that all the Acts complained of were done in that Capacity.

A reference to the statement of facts (p. 3) borne out by specifications of the evidence on which it is based, must carry the conviction that the case presented by the plaintiff's testimony combined every element of an armed conflict between two contending parties, each having armies in the field under control of commanding officers, exercising all the authority usually conferred upon military leaders. The Palacio commander, General Carrera, in command of the military district of Guayana, with headquarters at the city of Bolivar, goes out at the head of his army to meet General Hernandez in command of forces supporting Crespo's claims, a battle is fought, Carrera is defeated and killed, Hernandez comes into the city at the head of his army, takes and holds possession of the town from that time until the end of the war, governing the town and the district of Guayana with all the undisputed authority of military law, replacing the civil authorities, who had fled and abandoned their posts, prescribing rules and regulations for the government of the town and the port, dispensing and refusing passports and safe conducts, not only to the inhabitants, but to foreigners and captains of foreign vessels.

The only thing wanting in this description of war is the formal declaration of war.

In civil war there is no such declaration. Moreover, a declaration is not a necessary preliminary to any war. Our Mexican war was never declared. It began, and then Congress recognized its existence.

> "War may exist without a declaration on "either side. It is so laid down by the best "writers on the law of nations" (Lord Stowell).
>
> Cited in *Prize Cases*, 2 Black, p. 668.

Of the Dorr Rebellion in Rhode Island, Chief Justice TANEY said:

> "It was a state of war, and the established "government resorted to the rights and usages "of war to maintain itself and overcome the "unlawful opposition."
>
> *Luther* vs. *Borden*, 7 How., 45.

Mr. Justice NELSON, commenting on this expression in the Prize Cases (p. 697) says:

> "The term "war" must necessarily have "been used here by the Chief Justice in its "popular sense, and not as known to the law "of nations, as the State of Rhode Island con- "fessedly possessed no power under the "Federal Constitution to declare war."

What more is needed to demonstrate that every act complained of against General Hernandez was an act of war, done by a military commander, representing the *de facto* authority of his country, sustaining the lawful government of Venezuela, since triumphant, and recognized by the executive and legislative departments of our government?

In this view it is unnecessary to consider the exceptions to the exclusion of evidence taken by the plaintiff, for these facts appearing, the Court could not take cognizance of the case nor assume the

right to weigh every circumstance surrounding the exercise by a foreign authority of the undoubted power conferred upon him.

The trial court properly directed a verdict for the defendant; the Circuit Court of Appeals properly affirmed the judgment entered, and its judgment should in turn be affirmed by this Court.

New York, 15th March, 1897.

FREDERIC R. COUDERT, JR.,
Of Counsel for Defendant in Error.

No. 238. 36

Livingston Middleditch Co., 65 to 67 Dunne St. Telephone Franklin 126.

Brief of Goudert & Kling for

Supreme Court of the United States.

Filed Mar. 22, 1897.

GEORGE F. UNDERHILL,
Plaintiff in Error,

AGAINST

JOSE MANUEL HERNANDEZ,
Defendant in Error.

Brief for Defendant in Error.

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Statement of Facts.

In the early part of the year 1892, a revolution broke out in Venezuela, which lasted until about October 6 of the same year. The principal parties to this conflict were those who recognized Palacio as their chief, and those who followed the leadership of Crespo. General Hernandez, the defendant in error, was one of the principal officers in the army under General Crespo, and commanded the District of Guayana, in which the City of Bolivar is situated. The party headed by Crespo was finally successful and entered the City of Carraccas on October 6, 1892 (fol. 66). The Crespo Government, so-called, was formally recognized as the legitimate Government of Venezuela by the United States on October 26, 1892, and was at the time of the trial of this action the recognized government of that country (fol. 61). It had been recognized as the legitimate Venezuelan Government by other foreign powers before that time.

In August, 1892, General Hernandez was in command of an army composed of the adherents of Crespo; his troops were encamped near the City of Bolivar.

Some time previous to this, an army under General Santos de Carrera composed of the adherents of Palacio was sent out against General Hernandez. A battle between the two armies took place at Buena Vista on August 8, 1892. Buena Vista is about seven miles from Bolivar. On August 13, General Hernandez entered Bolivar at the head of his troops, and at once assumed command of the city and surrounding district. Between the date of the battle of Buena Vista and General Hernandez' entry into Bolivar, all the officials of the city left the country, and the vacant positions were filled by General Hernandez (fols. 96, 106). There is no evidence of any conflict after this occupation of the city, nor any evidence that the appointees of General Hernandez are not still holding their offices.

The plaintiff in error, Underhill, was during all this time a resident of Bolivar. Some time after the entry of General Hernandez, Underhill *applied to him as the officer in command for a passport to leave the city* (fol. 84). General Hernandez refused this request, and also repeated requests made by others in his behalf, until October 18, when a passport was given and the defendant left the country. This action is brought to recover damages for the detention caused by reason of the refusal to grant this passport, for an alleged confinement of the plaintiff in error in his own house and for certain alleged assaults and affronts by the soldiers of his army.

On the trial of the action at Circuit, the jury were at the close of the plaintiff's case, directed to find a verdict in favor of the defendant, upon which judgment was entered, which was affirmed by the United States Circuit Court of Appeals (fol. 148).

BRIEF AS TO FACTS.

There is no evidence that the defendant imprisoned or caused the plaintiff to be imprisoned in his house.

The house in which the defendant resided *belonged to the municipality* (fol 81). So far from keeping or desiring to keep the plaintiff imprisoned and to prevent his leaving the house, *it is proved that defendant was desirous of having the defendant leave it*, and sought to induce him to give up possession of the property which he needed for his troops.

But the plaintiff *refused to surrender possession* of the house, although defendant made repeated demands for its possession. The plaintiff's position as to what he calls false imprisonment may be best described in his own language:

"I said something yesterday about General Her-
" nandez asking me to vacate the house and my re-
" fusal. I think it was about the 21st of August. I
" did not go, because I did not consider, in the first
" place, he had any right to ask that question. *He*
" *demanded the house for his troops*—for his Winches-
" ter men. He was the Grand Mogul. Had the power to
" put me out by force of arms. He could not get in
" not unless they went over the fence. We would
" have stayed there. If he got me out of that house he
" would have had to put me out by force. He did not
" put me out. He made several demands. After
" that he sent a man who had furnished me wood for
" two or three years—was one of his generals. *He*
" *sent him to implore me to let him have the house. I*
" *told him no*, not unless they put the things in the
" street. I call imprisonment putting soldiers around
" my door, not allowing me to go out of my house.
" That is what I call imprisonment" (fols. 109, 110).

The plaintiff shows but one technical assault, and that is described at folio 74. It was simply that on August 15 he was going out of his gate to purchase

some grass, when some soldiers who had been sitting about the square in front of the house told him he must go back, and that it was the orders of the "muncho," by which the plaintiff thought they meant General Hernandez. There is, however, no evidence to show that this matter was ever brought to the attention of the defendant, although the plaintiff had after that sent several of his friends to demand a passport for him, and both he and Mrs. Underhill had personal interviews with him. The plaintiff himself states at folio 90, "he (General Hernandez) never touched me—only his men did, that is all. They handled me pretty roughly. I do not believe he instructed his men to strike me. I do not truly think he instructed his men to do that" (fol. 90).

The presence of troops about the house may best be explained by reference to the maps and photographs before the Court and to the plaintiff's testimony at fols. 81, 82, that about the square in front of plaintiff's house there were several barracks, the commandant's house, infantry barracks, &c.

That the defendant placed cannon in front of a house which he desired the plaintiff to vacate for the purpose of imprisoning him there, is a proposition so absurd that it does not deserve further consideration. Indeed it was not pressed by the plaintiff.

It must be very plain that the plaintiff was treated with singular forbearance by the defendant when we consider the conceded facts. The house belonged to the municipality and plaintiff was to occupy it so long only as he carried on the water works. He had decided to give up running these works, and yet when the house was demanded of him he refused to vacate it, and although the defendant might have removed him by force, he permitted him to occupy it during the whole term of his so-called imprisonment.

The defendant was a general in command of an army of a government recognized as the legitimate government of Venezuela by the governments of the United States and of foreign governments.

The plaintiff admits that General Hernandez was at the head of an army, and that General Santos Carera went out with troops against him (fols. 48, 96, 97, 265). That there was a conflict between the two armies, and that in the conflict General Hernandez' army was successful, and General Carrera killed (fol. 96). The defendant entered the City at the head of an army (fol. 89), and, to use the plaintiff's language, he was the Great Mogul at the time (fol. 93). In all his subsequent interviews the plaintiff assumes that the defendant was the general in command, he so addresses him in the letter of September 24 (fol. 91), and he and his friends apply to him as an officer in authority who had the right to grant and refuse passports. And at folio 89 he says: "When General Hernandez came in, he assumed command. He assumed all the government authority therein. *As far as I know he was the only constituted authority in the place.*" There certainly was no other authority, civil or military, within fifty miles of Bolivar besides General Hernandez (fol. 96).

Although it is immaterial whether the defendant was, or was not, what is called a "revolutionary" officer, yet we contend that the evidence fails to show even that he was a so-called successful revolutionary or insurgent general, or other than a general of the regular Venezuelan army. It is true that the plaintiff calls the defendant a rebel at times, and states that he was engaged in a revolution against the government. This, however, is his conclusion on a question of law, and his opinion of what is a rebel and what a revolution is somewhat hazy and indefinite. He is not familiar with the Spanish language, nor with the provisions of the constitution (fol. 95). He does not know the ground of the revolution (fol. 95), and whether Palacio refused to leave office after his term expired, nor whether he was declared a usurper by Congress (fol. 94), nor whether the war was levied by Congress against Palacio (fol. 94). His opinion is that Congress has something to do with the affairs of the country, but the President has more, and that if Con-

gress had levied war against Palacio, and Crespo was acting according to the laws of Congress, he would still call him a rebel.

The President of Venezuela is not an elective officer, but is simply one of the members of the Federal Council which is composed of one senator and one deputy from each of the States constituting the United States of Venezuela, and one deputy at large and elected by Congress; the term of the President and the members of the Federal Council is two years, and neither he nor they can be elected to a second consecutive term (fols. 48–49, Art. 61–62 of the Constitution of Venezuela).

The plaintiff does not enlighten us as to whom the Federal Council of the Venezuelan Congress selected as President in February, 1892. From the fact of Crespo's recognition we think it should be assumed that he was selected as President, and that some other person resisted his lawful claims to hold such office.

General Hernandez must be regarded as the captor of a hostile city during a general war. The revolution so called was not confined to Bolivar, but extended over the whole country (fol. 84). After the battle of Buena Vista all the officials of Bolivar left the City and General Hernandez occupied it though peaceably surrendered to him. The facts are more briefly and tersely stated in the opinion of Judge Wallace at folio 148.

At the close of the plaintiff's case the Court called upon his counsel to define his position. He admitted:

(1). That General Hernandez was in absolute control in Bolivar; though he claimed this control was without right or authority, yet as a matter of fact he had control (fol. 130).

(2). That the defendant was a General, had command of soldiers, fought a battle, had been victorious, and then came into the city and took possession (fol. 130).

(3). Before the defendant entered the City the civil authorities had all gone, and he took control of the City, as a General of soldiers, had an army of some size under his command, and had possession in that way (fol. 131).

BRIEF AS TO THE LAW.

POINT I.

The acts which the plaintiff claims constituted his false imprisonment by the defendant, having been done by him in his capacity of a military commander their validity cannot be questioned in the courts of another country.

The contest in Venezuela was a contest by the legitimate government to maintain its supremacy. It succeeded in this. Whatever was done by General Hernandez was done in his capacity as an officer of the government, and the plaintiff claims that the defendant is liable because the Crespo government was in the wrong; that the adherents of Crespo were rebels and overturned the legitimate government. There is no question made that the successful party to such contest was the Crespo party; that such party was in power up to the time of the trial of this action and had been recognized as the legitimate government of Venezuela by the United States. It being established that the superiors of the defendant constituted the legitimate government of Venezuela, the means by which this end was accomplished are immaterial and are not the subject of inquiry by the Courts of a foreign country. If the people of Venezuela choose to recognize Crespo as their President, the Courts of a foreign country cannot investigate the methods by which he acquired power.

It is well established that a sovereign is exempt from liability in the Courts of law of another country for acts done within his territory. This immunity is not limited by the character of the act done, as claimed by the counsel for the defendant in error, but applies to all acts done by the sovereign in his territory. The principle may be broadly stated that no foreign State or sovereign can be made responsible in the Courts of a foreign country for any act done within its own territory. Any redress for such acts must be sought for by appeal to the government of the injured citizen, and must be sought through diplomatic channels and not by means of a lawsuit.

One of the earliest cases in this Court, in which this principle was involved, is *The Exchange*, 7 Cranch, 112. In this case it appeared that the vessel in question was formerly an American vessel and belonged to the libellants. It was wrongfully seized by certain French officers, and afterward, while flying the French flag and under the command of French officers, put into the port of Philadelphia under stress of weather. Her former owners libelled her. The District Court held that it had no jnrisdiction and dismissed the libel. This decision was reversed on appeal to the Circuit Court, but this was in turn reversed by this Court.

Chief-Justice MARSHALL, in delivering the opinion of the Court, says · "The sovereign power of the action is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion —are of great weight and merit serious discussion."

The same principle was applied in the case of *L'Invincible*, 1 Wheat., 238, in which case the vessel in question was not seized by the vessels of the foreign sovereign but by private adventurers acting under commission from their sovereign. The Court held that this made no difference that the courts of this country had no jurisdiction *adjudicato* upon the question whether such capture was legal. The Court quotes with approval Vattel's views upon this immunity.

"That it is a consequence of the equality and absolute independence of sovereign states on the one hand and of the duty to observe uniform, impartial neutrality on the other. Under the former every sovereign becomes the acknowledged arbiter of his own justice, and cannot consistently with his own dignity, stoop to appear at the bar of other nations to defend the acts of his commissioned agents, much less the justice and legality of those rules of conduct which he prescribes to them."

The same question arose in the Supreme Court of the State of New York.

Hatch *v.* Baez, 7 Hun, 596.

The defendant at the time of the commission of the acts on which the cause of action was the President of the Dominican Republic and such acts were done by him in his official capacity. At the time of the commencement of the action he had ceased to be President. The Court held that the action could not be maintained; that the Courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory that to make the defendant amenable in our Courts for any act done by him in his official capacity would be a direct assault upon the independence of his own country; that the defendant's immunity had not ceased because his term as President had expired; that such immunity "springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

The authorities in England are to the same effect. The leading case is The Duke of Brunswick *v.* The King of Hanover (2 House of Lords, Cas. 1). The defendant, though the King of a foreign country, was a British subject, and at the time he was sued was exercising his rights as such in England. The House of Lords held, affirming the decision of the Court of Chancery, that although the defendant was a British subject, yet he could not be called to account for acts done abroad by him *whether right or wrong* in his capacity as sovereign. The principles established

by this Court in the above cases are reiterated : that a sovereign cannot be made responsible in the Courts of another country for acts done in his official capacity within his own territory.

The same question has been previously decided in

Nabob of Arcat *v.* The East India Co., 4 B. C. C., 180.

In a recent case in England, the Sultan of Jahore was sued in an action for breach of promise of marriage, which he made in England under his assumed name of Albert Baker. The Court held that the action could not be maintained : the Master of the Rolls, in delivering the opinion of the Court of Appeal, said : "As a consequence of the absolute independence of every sovereign authority and of the international comity, which induced every sovereign state to respect the independence of every other sovereign state, each and every one declined to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign of any other state, though such sovereign were within its territory."

Mighell *v.* Sultan of Jahore, 63 L. R., U. S. Q. B. Div. (Part II.), 593.

POINT II.

This immunity is not confined to the sovereign, but extends to all those in the service of the sovereign or the state where the acts complained of were done by them in the exercise of their public employment, or as an official of such sovereign or state.

This principle was involved in the case of *L'Invincible*, Wheat, 238, *supra*, in which this Court held that this immunity extended to private adventurers at sea when acting under the authority of the sovereign.

The Department of State has often requested the

opinion of the Attorney-General as to whether the Courts of this country could entertain jurisdiction of cases in which the acts done by the defendant were done in his official capacity as an officer of a foreign sovereign or state. The different Attorney-Generals to whom this question was submitted, uniformly advised the Government that such officers could not be held answerable in our tribunals for acts done in their own country in their official capacity.

In 1794, one Collet, not a "sovereign," but then lately French governor at Guadaloupe, a minor administrative official, was arrested in the United States in an action brought against him for the seizure and condemnation of a vessel. The matter having been brought to the attention of the Government of the United States, it was referred to the Attorney-General. The Attorney-General held that there was no ground on which the United States could then intervene, the defendant being subject to process, but he said: "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation."

Bradford, 1 Op., Atty. Gen., 45, 46..

In the case of Henry Sinclair, in 1797, the Attorney-General of the United States, held "that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission to any judiciary tribunal of the United States."

Lee, Atty. Gen., 1 Op., 81.

So strictly is this principle observed that it has been maintained on the highest authority and admitted by

the Government of the United States that an individual forming part of a public force, and acting under authority of his government, cannot be held to answer before the tribunals of a foreign government for an act committed within its jurisdiction, even in time of peace.

In November, 1840, one Alexander McLeod, a British subject was arrested in the State of New York on a charge of murder committed at the destruction of the steamer *Caroline*, in the port of Schlosser, in that state. The *Caroline* was a vessel in the employ of insurgents who were attempting to overthrow the Government of Canada, and the British Government demanded McLeod's release on the ground that the destruction of the steamer was "a public act of persons in Her Majesty's service, obeying the orders of their superior authorities;" that it could therefore "only be the subject of discussion between the two national governments," and could "not justly be made a ground of legal proceedings in the United States against the persons concerned." The courts of New York refused to release McLeod, and he was acquitted on proof of an alibi; but Mr. Webster, as Secretary of State, admitted the validity of the British Government's demand, and in order to reach any similar case that might arise in the future, Congress passed an Act of August 29, 1842 (R. S., Sec. 753), by which the courts of the United States are empowered to issue a writ of *habeas corpus*, where a person, "being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanctions of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."

For a full exposition of Mr. Webster's position, see Webster's works, especially Vol. 5, p. 129.

POINT III.

Where a military force, in the prosecution of a war, gains and holds possession of a part of the territory of a state, such territory is necessarily governed by the person in command of the force having possession, and his government is recognized by public law as a government de facto, to which all the inhabitants of the district owe obedience.

A.—In the case of the *United States* v. *Rice*, 4 Wheaton, 246, an action was brought against the defendant to recover duties on goods imported by him into Castine while it was in the military possession of the British forces in 1814. In delivering the opinion of the Court, Mr. Justice Story said: "By the conquest and *military occupation* of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. * * * By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose" (p. 254).

See also *U. S.* v. *Hayward*, 2 Gallison, 485.

The same principle was enforced by the United States during the war with Mexico.

Fleming v. *Page*, 9 Howard, 603.
Cross v. *Harrison*, 16 *Id.*, 190.

Also during the civil war in the United States.

New Orleans v. *Steamship Co.*, 20 Wallace, 387.

In both these instances—that of the war of 1812 and the war with Mexico—the occupant of the conquered

territory was a recognized government, in one case Great Britain and in the other the United States.

"According to every definition of martial law," said Mr. Cushing, "it suspends for the time being all the laws of the land, and substitutes in their place no law, that is, the mere will of the military commander."

Cushing, Atty. Gen., 8 Op., 365.

"It derives no authority from the civil law (using the term in its more general sense), nor assistance from the civil tribunals, for it overrules, suspends and replaces both. It is from its very nature an arbitrary power, and extends to all inhabitants (whether civil or military) of the district where it is in force. It has been used in all countries and by all governments, and it is necessary to the sovereignty of a state as the power to declare and make war."

Halleck, Int. Law, Ed. 1861, p. 373.

The same writer further observes that it "depends upon the constitution of the state whether restrictions or rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence." *Ibid.*

It is for this reason, as well as because of the governmental character of the act, that a military commander, administering the government of a territory (of which he has the occupation) under martial law, cannot be sued.

B.—This principle has been fully recognized by the United States in respect to the acts of Confederate authorities during our civil war. The Confederacy was never recognized as a government *de facto* in the usual sense. It sent and received no ambassadors. Its acts have been held not to be binding either on the United States or on the States which it represented. It never represented a nation, it never expelled the public authorities from the country, it never entered into any treaties, nor was it ever recognized as a government

by an independent power. Those who suffered by its acts have been without redress. Yet, it has never been supposed that those who administered it could be held liable for their public acts in any judicial tribunal.

The distinction here made has never been more clearly expressed than by the Supreme Court of the United States.

Texas v. *White*, 7 Wallace, 700.
Horn v. *Lockhart*, 17 *Id.*, 570.
Sprott v. *U. S.*, 20 *Id.*, 459.

In the case of *Thorington* v. *Smith*, 8 Wallace, 9, a suit was brought for the enforcement of a contract made in Confederate money.

In defense to the action it was argued that the Confederacy was not a lawful government. In answer to this contention, the Court, CHASE, C. J., said:

"There are several degrees of what is called *de facto* government.

"But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominted a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government, and (2), that while it exists, it must necesssarily be obeyed in civil matters by private citizens, who, by acts of obedience, rendered in submision to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. *Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority*, but they may be administered, also, by civil authority, supported more or less directly by military force."

It was held that the Confederacy was such a government, and the Court declared that its supremacy "*made obedience to its authority, in civil and local*

matters, not only a necessity but a duty. Without such obedience, civil order was impossible."

In the case at bar, this principle applies with greater force because at the time when General Hernandez was administering *de facto* at Bolivar, as Civil and Military Chief of the place, there was no other *de facto* government, in the international sense of the term, in Venezuela. The former titular government had relinquished even the pretense of legal authority over the State of Bolivar, by a decree dated August 26, 1892, well described by Mr. Scruggs, the Minister of the United States as "a mere *brutum fulmen* of an important faction against its rival who is now (September 7), and has been for weeks past, in actual possession of the ports named" (Ciudad, Bolivar and Puerto Cabello), the former titular government had undertaken to close by a paper proclamation ports which it was not in its power either to close up or keep open. There was no ministry. There was no one in Caracas to whom the diplomatic representatives might address themselves, (For. Rel., 1892, p. 631).

On the 18th of October, 1892, the Minister of the United States reported from Caracas that "order and tranquility had been restored in the capital, and apparently in all parts of the Republic." "The revolution has," he continued, "triumphed completely, and Gen. Crespo is now in unopposed possession of the machinery of government, with duly appointed cabinet ministers and public officers. The new cabinet is made up of representative men of character from the several States of the Republic, and seems to give very general satisfaction." (For. Rel., 1892, p. 636.) Eight days previously, on October 10, Mr. Scruggs had telegraphed an inquiry whether he should not recognize without delay and formally the *de facto* government of Gen. Crespo, which held "without opposition the full machinery of government," including a cabinet and public officers, and had "*the purpose and power of executing international obligations.*" (*Id.*, p. 634.) Mr. Scruggs was instructed to recognize

the new government, provided it was "accepted by the people, in the possession of the power of the nation, and fully established." (*Id.*, p. 635.) In a few days Mr. Scruggs fulfilled the formalities of "recognition." (*Id.*)

It is impossible to conceive of a case in which the authority of a *de facto* government, such as that maintained by General Hernandez, could be clearer.

It is to be observed that in this correspondence there was no pretense that the act of recognition on the part of the United States established the government or gave it a legal character. The government was recognized because it was "*accepted by the people, in possession of the power of the nation, and fully established.*"

This act of recognition, however, which was thus accorded, enabled the United States to treat with the new government as the sole government of Venezuela, with power to bind the people by its acts; and it gave notice to the authorities and the people of the United States that the Government of Gen. Crespo was the titular government of Venezuela.

POINT IV.

There is no evidence that the Crespo Government was not the legally constituted government of Venezuela. But even it were a revolutionary government its acts cannot be questioned in the Courts of a foreign jurisdiction.

It is claimed by the plaintiff in error, and much of his argument is devoted to maintaining that the Crespo government was a government of rebels, and that the faction which opposed it really constituted the lawful authority. There is no evidence whatever to sustain this.

The Government of Crespo was at all times the legally constituted Government of Venezuela and all its acts in obtaining possession of the reins of government were valid and cannot be questioned in this action. The people of Venezuela in recognizing the Crespo Government exercised a sovereign and political right for which neither they nor their officers can be called to account by the courts of a friendly power.

The Crespo Government was recognized by this country in 1892, and such government had control at the time of the trial of action. It being the recognized government, an action cannot be maintained in this Court brought upon the assumption that those who secured control did so improperly. It is for the people of Venezuela to determine who shall control their government, and not for the courts of a foreign country. But assuming that the Crespo Government was a revolutionary one, its success makes it *ab initio* the legitimate government. This question was fully considered by the Supreme Court of the United States in Williams *v.* Bruffy, 96 U. S., 185.

> " The other kind of *de facto* governments, to
> " which the doctrines cited relate, is such as
> " exists where a portion of the inhabitants of a
> " country have separated themselves from the
> " parent State and established an independent
> " government. The validity of its acts, both
> " against the parent State and its citizens or
> " subjects, depends entirely upon its ultimate
> " success. If it fail to establish itself perma-
> " nently, all such acts perish with it. If it
> " succeed, and become recognized, its acts,
> " *from the commencement of its existence*, are
> " upheld as those of an independent nation.
> " Such was the case of the State governments
> " under the old confederation on their separa-
> " tion from the British crown. Having made
> " good their declaration of independence, every-
> " thing they did from that date was as valid
> " as if their independence had been at once ac-

"knowledged. Confiscations, therefore, of "enemy's property made by them were sus- "tained as if made by an independent nation."

Same doctrine affirmed and recognized in Ford *v.* Surget, 97 U. S., 594.

POINT V.

An officer of an army, while serving in the enemy's country during war, is not liable to an action for injuries resulting from his military orders or acts.

This proposition is settled in *Dow* v. *Johnson*, 100 U. S., 158.

In that case General Dow, during the war of the Rebellion, ordered the seizure of Johnson's goods while the southern part of Louisiana was in possession of the Union army. General Dow was sued for this alleged trespass in the civil courts of Louisiana. The General made no defense to this suit, and judgment by default was rendered against him. Suit was brought on this judgment in the Courts of Maine. On appeal to the United States Supreme Court it was held that such action could not be maintained.

> An officer of the army of the United States, while serving in the enemy's country during the rebellion, was not liable to an action in the Courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own government.
>
> * * * * * *
>
> "When, therefore, our armies marched into

" the country which acknowledged the authority
" of the Confederate Government, that is, into
" the enemy's country, their officers and soldiers
" were not subject to its laws, nor amenable to
" its tribunals for their acts. They were sub-
" ject only to their own government, and only
" by its laws, administered by its authority,
" could they be called to account. As was ob-
" served in the recent case of Coleman *v.* Ten-
" nessee, it was well settled that a foreign army,
" permitted to march through a friendly
" country, or to be stationed in it by authority
" of its sovereign or government, is exempt
" from its civil and criminal jurisdiction. The
" law was so stated in the celebrated case of
" *The Exchange*, reported in the 7th of Cranch.
" Much more must this exemption prevail
" where a hostile army invades an enemy's
" country. There would be something singu-
" larly absurd in permitting an officer or soldier
" of an invading army to be tried by his enemy,
" whose country it had invaded.

" The same reasons for his exemption from
" criminal prosecution apply to civil proceedings.
" There would be as much incongruity, and as
" little likelihood of freedom from the irritations
" of the war, in civil as in criminal proceedings
" prosecuted during its continuance. In both
" instances, from the very nature of war, the
" tribunals of the enemy must be without juris-
" diction to sit in judgment upon the military
" conduct of the officers and soldiers of the in-
" vading army. It is difficult to reason upon a
" proposition so manifest; its correctness is evi-
" dent upon its bare announcement, and no ad
" ditional force can be given to it by any amount
" of statement as to the proper conduct of
" war. It is manifest that if officers or sol-
" diers of the army could be required to
" leave their posts and troops, upon the
" summons of every local tribunal, on pain of a

" judgment by default against them, which at " the termination of hostilities could be enforced " by suit in their own States, the efficiency of " the army as a hostile force would be utterly " destroyed. Nor can it make any difference " with what denunciatory epithets the complain- " ing party may characterize their conduct If " such epithets could confer jurisdiction, they " would always be supplied in every variety of " form. An inhabitant of a bombarded city " would have little hesitation in declaring the " bombardment unnecessary and cruel. Would " it be pretended that he could call the com- " manding general, who ordered it, before a " local tribunal to show its necessity or be " mulcted in damages. The owner of supplies " seized or property destroyed would have no " difficulty, as human nature is constituted, in " believing and affirming that the seizure and " destruction were wanton and needless. All " this is too plain for discussion and will be " readily admitted.

* * * * * * * *

"If private property there was taken by an offi- " cer or a soldier of the occupying army, acting in " his military character, when, by the laws of " war, or the proclamation of the commanding " general, it should have been exempt from " seizure, the owner could have complained to " that commander, who might have ordered " restitution, or send the offending party before " a military tribunal, as circumstances might " have required, or he could have had recourse to " the government for redress. But there could " be no doubt of the right of the army to ap- " propriate any property there, although be- " longing to private individuals, which was " necessary for its support or convenient for its " use. This was a beligerent right, which was " not extinguished by the occupation of the " country, although the necessity for its exercise

" was thereby lessened. However exempt from
" seizure on other grounds private property
" there may have been, it was always subject
" to be appropriated, when required by the ne-
" cessities or convenience of the army, though
" the owner of property taken in such case may
" have had a just claim against the government
" for indemnity." * * * * *

" This doctrine of non liability to the tribu-
" nals of the invaded country for acts of war-
" fare is as applicable to members of the Con-
" federate army, when in Pennsylvania, as to
" members of the National army when in the
" insurgent States. The officers or soldiers of
" neither army could be called to account civilly
" or criminally in those tribunals for such acts,
" whether those acts resulted in the destruction
" of property or the destruction of life; nor
" could they be required by those tribunals to
" explain or justify their conduct upon any
" averment of the injured party that the acts
" complained of were unauthorized by the neces-
" sities of war."

* * * * * * *

" Nor is the position of the invading beliger-
" ent affected, or his relation to the local tribu-
" nals changed, by his temporary occupation and
" domination of any portion of the enemy's
" country. As a necessary consequence of such
" occupation and domination, the political rela-
" tions of its people to their former government
" are, for the time severed. But for their pro-
" tection and benefit, and the protection and
" benefit of others not in the military service, or,
" in other words, in order that the ordinary pur-
" suits and business of society may not
" be unnecessarily deranged, the muni-
" cipal laws—that is, such as affect
" private rights of persons and property,
" and provide for the punishment of crime - are
" generally allowed to continue in force,

"and to be administered by the ordin-
"ary tribunals as they were administered
"before the occupation. They are consid-
"ered as continuing, unless suspended or super-
"seded by the occupying belligerent. But their
"continued enforcement is not for the protec-
"tion or control of the army, or its officers or
"soldiers. These remain subject to the law of
"war, and are responsible for their conduct only
"to their own government, and the tribunals by
"which those laws are administered. If guilty
"of wanton cruelty to persons, or of unneces-
"sary spoliation of property, or of other acts
"not authorized by the laws of war, they may
"be tried and punished by the military tri-
"bunals. They are amenable to no other tri-
"bunal, except that of public opinion, which, it
"is to be hoped, will always brand with infamy
"all who authorize or sanction acts of cruelty
"and oppression."

This case was approved in Freeland *v.* Williams, 131 U. S., at p. 416.

"Ever since the case of Dow *v.* Johnson, 100 U. S., 158, the doctrine has been settled in the Courts that in our late civil war each party was entitled to the benefit of belligerent rights as in the case of public war, and that for an act done in accordance with the usages of civilized warfare, under and by military authority of either party no civil liability attached to the officers or soldiers who acted under such authority."

Lamar *v.* Browne, 92 U. S., at p. 197.
Coleman *v.* Tennessee, 97 U. S., 509.

Plaintiff's Authorities.

The plaintiff in error fails to cite a single authority which would tend to hold the defendant liable in this action. The defendant, as the commander of a conquered city, ordered that no person should land after 8 o'clock at night (*fol. 125*) and refused to allow the defendant to leave the city. That an officer in command of an army has a right to refuse to allow citizens to go beyond certain lines is beyond question. It is not surprising that the plaintiff can find no authority to support his proposition.

The cases cited by the plaintiff are not in point.

They are all extracts from opinions in cases in which the question at issue in this case was not involved. Where the question in this case was directly involved as in Dow *v.* Johnson and Ford *v.* Surget, the Courts held the defendant not liable.

A reference to the cases cited in plaintiff's brief in the Court below which we assume will be cited by him in his brief to this Court, will demonstrate that the question raised here was not there involved.

Mitchell *v.* Harmony, 13 How., 115.

The opinion shows the nature of the action.

> "There is no dispute about the facts which "relate to this part of the case, nor any con- "tradiction in the testimony. The plain- "tiff entered the hostile country openly for "the purpose of trading, in company with "other traders, and under the protection "of the American flag. The inhabi "tants with whom he traded had sub- "mitted to the American arms, and the country "was in possession of the military authorities of "the United States. The trade in which he "was engaged was not only sanctioned by the "commander of the American troops, but, as "appears by the record, was permitted by the "Executive Department of the government,

"whose policy it was to conciliate, by kindness
"and commercial intercourse, the Mexican pro
"vinces bordering on the United States, and by
"that means weaken the power of the hostile
"government of Mexico, with which we were
"at war. It was one of the means resorted to
"to bring the war to a successful conclusion.

"It is certainly true, as a general rule,
"that no citizen can lawfully trade
"with a public enemy; and, if found
"to be engaged in such illicit traffic, his
"goods are liable to seizure and confiscation.
"But the rule has no application to a case of
"this kind; nor can an officer of the United
"States seize the property of an American citi-
"zen for an act which the constituted authori-
"ties, acting within the scope of their lawful
"powers, have authorized to be done."

And in referring to this case in Dow *v.* Johnson the Court says: "We do not controvert the doctrine of Mitchell *v.* Harmony, reported in the 13th of Howard, on the contrary, we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our government."

Raymond *v.* Thomas, 91 U. S., 712, simply held that General Canby, while military commander in South Carolina, had no right by his order to nullify a decree of a Court of competent jurisdiction. This suit was between third parties, and as General Canby was not a party, it did not involve any question as to his personal liability to third parties. This was also true in Planter's Bank *v.* Union Bank, 83 U. S., 483.

The cases *ex parte* Milligan, Smith *v.* Shaw, McConnell *v.* Hampton, cited on pages 32 and 33 of plaintiff's brief, show that the question involved in this case was not there involved.

Beckwith *v.* Bean, 93 U. S., 266, was a case of an arrest by a provost marshal of a citizen *in Vermont* during the Rebellion without a warrant. As Ver-

mont was not a conquered country, and it was not then in a state of war against the party represented by the marshal, the decision there can have no application to our case.

Ex parte Milligan, 71 U. S., 2, simply defines the jurisdiction of courts marshal, and that Indiana was not the seat of war and that the Civil Courts had jurisdiction.

The other cases cited show that the point here involved was not there considered.

POINT VI.

The only question to be determined is simply whether there was a war, and not whether it is successful.

The unsuccessful officer is liable to be tried for treason, but this in no way affects his exemption to answer for his acts as such officer in a civil action. This exemption of the unsuccessful party is referred to in the above quotation, and was directly passed upon in Ford *v.* Surget, 97 U. S., 594.

> " A, a resident of Adams County, Missis-
> " sippi, whose cotton was there burnt by B, in
> " May, 1892, brought an action for its value
> " against the latter, who set up a defense that
> " that State, whereof he was at that date a
> " resident, was then in subjection to and under
> " the control of the 'Confederate States'; that
> " an act of their congress, approved March 6,
> " 1862, declared that it was the duty of all
> " military commanders, in their service to de
> " stroy all cotton whenever, in their judgment,
> " the same should be about to fall into the
> " hands of the United States; that, in obedience
> " to that act, the commander of their forces in
> " Mississippi issued an order, directed to his
> " subordinate officers in that State, to burn all

" cotton along the Mississippi River likely to
" fall into the hands of the forces of the
" United States; that the provost marshal
" of that county was charged with executing
" within it that order; that A's cotton was
" likely to fall into the hands of the United
" States; that the provost marshal ordered and
" required B to burn it, and that B did burn it
" in obedience to the said act and the orders of
" that commander and the provost marshal.
" *Held*, that the said act, as a measure
" of legislation, can have no force in any
" Court recognizing the Constitution of the
" United States as the supreme law of the
" land. That it did not assume to confer upon
" such commanders any greater authority than
" they, by the laws and usages of war, were
" entitled to exercise. That the orders, as an
" act of war, exempted a soldier of the Con-
" federate army who executed them from lia-
" bility to the owner of the cotton, who, at the
" time of its destruction, was a voluntary resi-
" dent within the lines of the insurrection."

* * * * * *

" We assume that the following propositions
" are settled by, or are plainly to be deduced
" from, our former decisions:

* * * * * *

" The Confederate Government is to be re-
" garded by the courts as simply the military
" representative of the insurrection against the
" authority of the United States.

" To the Confederate army was, however,
" conceded, in the interest of humanity, and to
" prevent the cruelties of reprisals and retalia
" tion, such belligerent rights as belonged under
" the laws of nations to the armies of independ-
" ent governments engaged in war against each
" other,—that concession placing the soldiers
" and officers of the rebel army as to all mat-
" ters directly connected with the mode of pro-

"secuting the war, 'on the footing of those "engaged in lawful war,' and exempting 'them "from liability for acts of legitimate warfare.'

* * * * * *

"It would seem to be a logical deduction from "these doctrines—a deduction strengthened by "considerations of humanity and public neces- "sity—that the destruction of the same cotton, "under the orders of the Confederate military "authorities, for the purpose of preventing it "from falling into the hands of the Federal "army, was, under the circumstances alleged in "the special pleas, an act of war upon the part "of the military forces of the rebellion, for "which the person executing such orders was "relieved from civil responsibility at the suit of "the owner voluntarily residing at the time "within the lines of the insurrection."

POINT VII.

Plaintiff's exception to the rejection of evidence to show malice are without merit. Plaintiff's claim that the acts of General Hernandez were malicious or unnecessary then would not confer jurisdiction on the civil courts.

This was also considered in Dow *v.* Johnson, *supra*, at page 165:

> "Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction they would always be supplied in every variety of form. An inhabitant of a bombarded city would have little hesitation in declaring the bombardment unnecessary and cruel."

In justice to General Hernandez it should be stated that there is no evidence whatever in the case to show that the plaintiff was singled out as one who should not leave Bolivar and was not treated as others, or that the orders not to leave Bolivar were not general.

CONCLUSION.

The whole question is summed tersely in Dow *v.* Johnson, *supra.*

"The question here is: What is the law "which governs an army invading an "enemy's country? It is not the civil law "of the invaded country; it is not the civil "law of the conquering country; it is "military law—the law of war—and its "supremacy for protection of the officers "and soldiers of the army, when in service "in the field in the enemy's country, is as "essential to the efficiency of the army as "the supremacy of the civil law at home, "and, in the time of peace, is essential to "the preservation of liberty."

The judgment appealed from should be affirmed.
March, 1897.

F. R. COUDERT,
Attorney for Defendant in Error.

F. R. COUDERT,
JOSEPH KLING,
Of Counsel.

UNDERHILL *v.* HERNANDEZ.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 86. Argued October 22, 25, 1897. — Decided November 29, 1897.

Hernandez was in command of a revolutionary army in Venezuela when an engagement took place with the government forces which resulted in the defeat of the latter, and the occupation of Bolivar by the former. Underhill was living in Bolivar, where he had constructed a waterworks system for the city under a contract with the government, and carried on a machinery repair business. He applied for a passport to leave the city, which was refused by Hernandez with a view to coerce him to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces. Subsequently a passport was given him. The revolutionary government under which Hernandez was acting was recognized by the United States as the legitimate government of Venezuela. Subsequently Underhill sued Hernandez in the Circuit Court for the Second Circuit to recover damages caused by the refusal to grant the passport, for alleged confinement of him to his own house, and for alleged assaults and affronts by Hernandez' soldiers. Judgment being rendered for defendant the case was taken to the Circuit Court of Appeals, where the judgment was affirmed, the court holding "that the acts of the defendant were the acts of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." *Held* that the Circuit Court of Appeals was justified in that conclusion.

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

In the early part of 1892 a revolution was initiated in Venezuela against the administration thereof, which the revo-

lutionists claimed had ceased to be the legitimate government. The principal parties to this conflict were those who recognized Palacio as their head and those who followed the leadership of Crespo. General Hernandez belonged to the anti-administration party, and commanded its forces in the vicinity of Ciudad Bolivar. On the 8th of August, 1892, an engagement took place between the armies of the two parties at Buena Vista, some seven miles from Bolivar, in which the troops under Hernandez prevailed, and on the 13th of August, Hernandez entered Bolivar and assumed command of the city. All of the local officials had in the meantime left, and the vacant positions were filled by General Hernandez, who from that date and during the period of the transactions complained of was the civil and military chief of the city and district. In October the party in revolt had achieved success generally, taking possession of the capital of Venezuela, October 6, and on October 23, 1892, the Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the United States.

George F. Underhill was a citizen of the United States, who had constructed a waterworks system for the city of Bolivar under a contract with the government, and was engaged in supplying the place with water, and he also carried on a machinery-repair business. Some time after the entry of General Hernandez, Underhill applied to him as the officer in command for a passport to leave the city. Hernandez refused this request, and requests made by others in Underhill's behalf, until October 18, when a passport was given and Underhill left the country.

This action was brought to recover damages for the detention caused by reason of the refusal to grant the passport; for the alleged confinement of Underhill to his own house; and for certain alleged assaults and affronts by the soldiers of Hernandez' army.

The cause was tried in the Circuit Court of the United States for the Eastern District of New York, and on the conclusion of plaintiff's case, the Circuit Court ruled that upon the facts plaintiff was not entitled to recover, and directed

a verdict for defendant on the ground that "because the acts of defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor." Judgment having been rendered for defendant, the case was taken to the Circuit Court of Appeals, and by that court affirmed upon the ground "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." 26 U. S. App. 573. Thereupon the cause was brought to this court on certiorari.

Mr. Walter S. Logan for Underhill. *Mr. Charles M. Demond* was on his brief.

Mr. Frederic R. Coudert, Jr., for Hernandez. *Mr. Joseph Kling* was on his brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact. Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military

force, generally speaking foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. *United States* v. *Rice*, 4 Wheat. 246; *Fleming* v. *Page*, 9 How. 603; *Thorington* v. *Smith*, 8 Wall. 1; *Williams* v. *Bruffy*, 96 U. S. 176; *Ford* v. *Surget*, 97 U. S. 594; *Dow* v. *Johnson*, 100 U. S. 158; and other cases.

Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. *The Three Friends*, 166 U. S. 1.

In this case, the archives of the State Department show that civil war was flagrant in Venezuela from the spring of 1892; that the revolution was successful; and that the revolutionary government was recognized by the United States as the government of the country, it being, to use the language of the Secretary of State in a communication to our minister to Venezuela, "accepted by the people, in the possession of the power of the nation and fully established."

That these were facts of which the court is bound to take judicial notice, and for information as to which it may consult the Department of State, there can be no doubt. *Jones* v. *United States*, 137 U. S. 202; *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149.

It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti or mere mobs.

We entertain no doubt upon the evidence that Hernandez

was carrying on military operations in support of the revolutionary party. It may be that adherents of that side of the controversy in the particular locality where Hernandez was the leader of the movement entertained a preference for him as the future executive head of the nation, but that is beside the question. The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the Circuit Court of Appeals was justified in concluding "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

The decisions cited on plaintiff's behalf are not in point. Cases respecting arrests by military authority in the absence of the prevalence of war; or the validity of contracts between individuals entered into in aid of insurrection; or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy; and the like, do not involve the questions presented here.

We agree with the Circuit Court of Appeals, that "the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces," and that "it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive;" and we concur in its disposition of the rulings below. The decree of the Circuit Court is

Affirmed.